of Nashville and Davidson County v. Deja Vu of Nashville, Inc., 535 U.S. 1073 (2002).

2. District Court Attorneys' Fees Rulings

Pursuant to 42 U.S.C. § 1988, Respondents filed four separate motions for attorneys' fees and costs, which were referred to Magistrate Judge Juliet Griffin. On October 1, 2002, Magistrate Judge Griffin issued a Report and Recommendation recommending that the district court grant in part and deny in part Respondents' first three motions for attorneys' fees. (R&R1, App. 79a-106a.) Respondents and the Metropolitan Government filed objections to the Report and Recommendation. The district court approved the first Report and Recommendation in its entirety on December 6, 2002. (Order on R&R1, App. 77a-78a.) The district court also directed the parties to attempt to agree on an attorneys' fees figure, based upon the rulings contained in the Report and Recommendation. The resulting figure was $431,099.56.

On February 7, 2003, the parties filed a Stipulated Notice of the total amount of attorneys' fees encompassed by the court's rulings on the first three motions for attorneys' fees. The parties entered into the stipulation without waiving any rights to appeal the findings that resulted in the figure.

On September 16, 2003, Magistrate Judge Griffin issued a second Report and Recommendation, in which she recommended that the district court grant Respondents' fourth motion for attorneys' fees in its entirety as well as Respondents' re-filed motion for costs. (R&R2, App. 19a-27a.) In so ruling, Magistrate Judge Griffin recommended

an additional award of $46,870 in attorneys' fees, as well as $58,565.66 in costs.

The Metropolitan Government filed a timely objection to the Report and Recommendation. However, on September 30, 2003, the district court entered an order approving the Report and Recommendation in its entirety. (Order on R&R2, App. 18a; as amended, App. 76a.) That order was a final order. (App. 76a.) The Metropolitan Government filed a timely notice of appeal to the Sixth Circuit Court of Appeals.

3. Sixth Circuit Court of Appeals Decision

In a 2-1 decision, a Panel of the Sixth Circuit Court of Appeals affirmed the attorneys' fees award. *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville and Davidson County, Tennessee*, 421 F.3d 417 (6th Cir. 2005) ("*Deja Vu II*"). First, the Panel held that this Court's decision in *City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004), did not "upset" the Respondents' status as prevailing parties. *Id.* at 420-21. In so holding, the Panel noted that the rule of law from *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993), which states that new Supreme Court rulings must be given retroactive effect, only applies to "cases still open on direct review." *Deja Vu II*, 421 F.3d at 420-21 (citing *Harper*, 509 U.S. at 97). According to the Panel, the underlying ruling on the merits of the *Deja Vu* case became final when this Court initially denied certiorari, (or prior to this Court's ruling in *Z.J. Gifts*,) and thus, the *Harper* rule did not "expose the [underlying merits ruling] to new Supreme Court developments." *Id.*

The Panel next held that the circumstances of this case did not qualify as "special circumstances" that would render the award of attorneys' fees unjust under Section 1988. *Id.* at 422-23. The Metropolitan Government had argued on appeal that the Sixth Circuit should adopt the dictum of the Second Circuit Court of Appeals stating that "a final judgment confirming plaintiff's status as the prevailing party followed by a Supreme Court decision in another case invalidating the theory on which plaintiffs prevailed" might render an attorneys' fees award "unjust." *New York State Nat'l Org. for Women v. Terry*, 159 F.3d 86, 97 (2d Cir. 1998). (*See Deja Vu II*, 421 F.3d at 422; *see also* Metro's Pet. for Rehearing & Rehearing *En Banc* at 7, App. 281a.) The Panel reasoned that even if it agreed with the dictum in *Terry*, *Z.J. Gifts* arose under "very different circumstances" than those in the *Deja Vu* case and, thus, no "special circumstances" existed in this case. *Deja Vu II*, 421 F.3d at 422-23 & n.3. Circuit Judge Rogers dissented, finding that "[i]f ever 'exceptional circumstances' warrant denial of fees to a prevailing party, it is when that party had prevailed by obtaining injunctive relief that the party clearly was, in retrospect, never entitled to." *Id.* at 424.[1]

The Metropolitan Government then petitioned the Sixth Circuit Court of Appeals for rehearing and rehearing *en banc*, which the court denied. (App. 201a-202a.) This petition for a writ of certiorari followed.

[1] The Sixth Circuit also addressed the Metropolitan Government's objections to the specific amount of fees awarded. However, the Metropolitan Government is not petitioning this Court for a writ of certiorari on that portion of the Sixth Circuit's opinion.

REASONS FOR GRANTING THE WRIT

The Court should grant this petition because the circumstances of this case are the type of "special circumstances" that render an award of attorneys' fees under 42 U.S.C. § 1988 unjust under *Hensley v. Eckerhart*, 461 U.S. 424, 429 (1983). Because this Court has neither defined "special circumstances" nor instituted a test to determine when "special circumstances" exist in the context of an attorneys' fees statute, the circuits are split as to the appropriate method for determining whether "special circumstances" exist. This split, along with the absence of a Supreme Court defined standard, results in courts awarding attorneys' fees in ways that are irreconcilable with the purposes and policies underlying the statute. Specifically, an attorneys' fees award in a case wherein a final judgment on the merits is followed by a pronouncement of the Court invalidating the theory on which the "prevailing party" obtained judgment in its favor undermines the purposes and policies underlying Section 1988. Accordingly, such circumstances should qualify as "special circumstances" that render the attorneys' fees award "unjust" under Section 1988.[2]

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[2] As the Statement of the Case reflects, the district court dissolved the first preliminary injunction after both the Metropolitan Government amended Chapter 6.54 and the Tennessee General Assembly passed 1998 Tennessee Public Acts Chapter 794. Both amendments were passed to remedy the infirmities identified by the district court in granting the first injunction. Although the Metropolitan Government objected to all of the attorneys' fees in the lower court proceedings, for purposes of this Petition, the Metropolitan Government is seeking review of only the attorneys' fees that accrued subsequent to dissolution of the first injunction.

The instant case is one such situation. The ruling of the Sixth Circuit Court of Appeals on the merits of the instant case directly conflicts with this Court's ruling in *City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774 (2004), and the Sixth Circuit's attempt to distinguish *Z.J. Gifts* from this case is unwarranted. Further, in failing to acknowledge the circumstances of this case as "special circumstances" that render the attorneys' fees award unjust, the ruling of the Sixth Circuit is irreconcilable with the purposes and policies behind Congress's passage of Section 1988.

1. A Final Judgment on the Merits Deeming a Plaintiff a "Prevailing Party," Followed by a United States Supreme Court Decision Invalidating the Theory on Which the Plaintiff Prevailed, Qualifies as "Special Circumstances" That Render an Attorneys' Fees Award Unjust

42 U.S.C. § 1988 provides that "the court, in its discretion may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." Although the statute suggests that this provision is within the discretion of the court, this Court has recognized that the prevailing party should recover attorneys' fees unless "special circumstances" render an award of attorneys' fees unjust. *Hensley*, 461 U.S. at 429. Thus, when determining whether to award attorneys' fees under Section 1988, courts must determine the meaning of both the statute and the "special circumstances" exception.

The first step in construing statutes is to "'try to determine congressional intent, using traditional tools of statutory construction.'" *Dole v. United Steelworkers of America*, 494 U.S. 26, 35 (1990) (quoting *NLRB v. United*

Food & Commercial Workers Union, 484 U.S. 112, 123 (1987)). Although the "'starting point is the language of the statute,'" *id.* (quoting *Schreiber v. Burlington N., Inc.*, 472 U.S. 1, 5 (1985)), "'"in expounding on a statute, [this Court] . . . look[s] to the provisions of the whole law, and to *its object and policy*."'" *Id.* (quoting *Massachusetts v. Morash*, 490 U.S. 107, 115 (1989) (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987)) (emphasis added)).

Although the text of Section 1988 does not specifically provide for a "special circumstances" exception to the awarding of attorneys' fees, an examination of the legislative history of the statute establishes that Congress intended a "special circumstances" exception when it enacted Section 1988. Congress enacted Section 1988 in reaction to this Court's ruling in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975). S. REP. NO. 94-1011, at 4 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5912. In *Alyeska*, this Court held that attorneys' fees were unavailable to the prevailing parties under civil rights statutes absent specific authorization from Congress. *Alyeska*, 421 U.S. at 271. Thus, Congress enacted Section 1988 to provide specific authorization for attorneys' fees under certain civil rights statutes. S. REP. NO. 94-1011, at 4. The Senate stated: "It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act." *Id.* at 4.

The Senate recognized one such standard by referencing the "special circumstances" exception from this Court's decision in *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968). S. REP. NO. 94-1011, at 4. In *Newman*, this Court reasoned that, based on the purpose underlying Title II of the Civil Rights Act of 1964, a party who successfully obtains an injunction should receive attorneys'

fees unless special circumstances render an award unjust. *Newman*, 390 U.S. at 402.

In *Newman*, this Court acknowledged that one of the purposes in awarding attorneys' fees under Title II was to "encourage individuals injured by racial discrimination to seek judicial relief under Title II." *Id.* The Senate Report accompanying the bill that became Section 1988 reveals a similar Congressional intent:

> [T]he citizen who must sue to enforce the law has little or no money with which to hire a lawyer. If private citizens are to be able to assert their civil rights, and if those who violate the Nation's fundamental laws are not to proceed with impunity, then citizens must have the opportunity to recover what it costs them to *vindicate these rights in court*.

S. REP. NO. 94-1011, at 2 (emphasis added).

Similarly, the report accompanying the corresponding House of Representatives bill for Section 1988 recognized that "a vast majority of the victims of civil rights violations cannot afford legal counsel" and "are unable to present their cases to the courts." H.R. REP. NO. 94-1558, at 1 (1976). The drafters of the House bill stated that the award of attorneys' fees under the statute was intended to give people who cannot afford legal counsel "effective access to the judicial process where their grievances can be resolved according to law." *Id.*

Where a party has received relief to which, in retrospect, it was not entitled, the aforementioned purposes underlying Section 1988 are not advanced by awarding attorneys' fees. A party that "prevails" because of a misapplication of the law does not "vindicate" its civil rights as

contemplated by the Senate in drafting Section 1988. Further, such "prevailing parties" are not "victims of civil right violations" as contemplated by the House of Representatives in drafting the bill. The First Circuit has recognized that "the analysis under § 1988 must focus, not on the defendants' conduct, but on the ***harm suffered by the plaintiffs***. . . . " *Williams v. Hanover Hous. Auth.*, 113 F.3d 1294, 1302 (1st Cir. 1997) (emphasis added) (holding that a defendant's good faith is not a special circumstance). Likewise, the Eighth Circuit has stated, "What a court ought to do, we think, is to concentrate on the objective meritoriousness of a plaintiff's claim, and refuse to award fees if the claim is frivolous or groundless." *Tyler v. Corner Const. Corp.*, 167 F.3d 1202, 1206 (8th Cir. 1999).

This Court addressed the retroactive effect of its decisions on parties in litigation in *Harper v. Virginia Dep't of Taxation*. In *Harper*, the Court stated:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Harper, 509 U.S. at 97.

Harper should not prevent retroactive application of this Court's rulings to a case wherein there has already been a final order on the merits but attorneys' fees are still at issue. The award of attorneys' fees necessarily follows a final judgment on the merits. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200 (1988) (recognizing that the determination for the award of attorneys' fees is

separate from and subsequent to a decision on the merits). Specifically, this Court has never addressed the question of whether a final judgment on the merits, followed by a pronouncement of the Court invalidating the theory on which the "prevailing party" obtained judgment in his favor, renders the party no longer "prevailing." Such circumstances, at the very least, should qualify as "special circumstances" that render the attorneys' fees award "unjust" under Section 1988.

In *New York State Nat'l Org. for Women v. Terry*, the Second Circuit Court of Appeals recognized in dicta that "special circumstances" may exist in such a case. *Terry*, 159 F.3d at 97. The court noted that "a final judgment confirming plaintiff's status as the prevailing party followed by a Supreme Court decision in another case invalidating the theory on which plaintiffs prevailed – might make unjust the subsequent award of attorney's fees to plaintiffs who would no longer be entitled to prevail on this theory." *Id.* The Sixth Circuit has noted that "little guidance has been provided by the Supreme Court as to precisely what constitutes a special circumstance that would defeat a fee award." *Deja Vu II*, 421 F.3d at 422. As a result, the circuits are divided as to the appropriate method for determining whether "special circumstances" exist and, thus, warrant denial of attorneys' fees. *See, e.g.*, *Deja Vu II*, 421 F.3d at 422 (employing a case-by-case approach); *Raishevich v. Foster*, 247 F.3d 337, 344-45 (2d Cir. 2001) (determining first, whether the "plaintiff's claim was so strong on the merits and so likely to result in a substantial judgment that counsel in similar cases could be easily and readily obtained" and second, whether the award of attorneys' fees would "work injustice"); *Doe v. Bd. of Educ. of Baltimore County*, 165 F.3d 260, 264 n.2 (4th

Cir. 1998) (employing a case-by-case approach); *Stefan v. Laurenitis*, 889 F.2d 363, 371 (1st Cir. 1989) (considering "the presence or absence of any bad faith or obdurate conduct on the part of either party, and any unjust hardship that a grant or denial of fee-shifting might impose"); *Seattle Sch. Dist. No. 1 v. Washington*, 633 F.2d 1338, 1348 (9th Cir. 1980) (analyzing first "whether allowing attorney's fees in a particular case would further the congressional purpose in adopting the Acts" and second the "balance of equities").

This split among circuits poses the danger, and creates the result, that courts will enforce Section 1988 in a manner that contravenes the purposes underlying Section 1988. The potential for misapplication of Section 1988 is particularly high in the Sixth Circuit, Fourth Circuit, and First Circuit, all of which specifically reject the Ninth Circuit's approach of considering the purposes underlying attorneys' fees statutes when determining whether "special circumstances" exist. *See, e.g., Wikol v. Birmingham Pub. Schs. Bd. of Educ.*, 360 F.3d 604, 611 (6th Cir. 2004), *cited in Deja Vu II*, 421 F.3d at 422; *Stefan*, 889 F.2d at 371; *Doe*, 165 F.3d at 264. This is particularly troubling because the Ninth Circuit's test is but a restatement of the accepted methodology of this Court. *See, e.g., Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978) (holding that the policy underlying attorneys' fees requires that a prevailing defendant receive an award only when plaintiff's action is "frivolous, unreasonable, or without foundation"), *cited in Hensley*, 461 U.S. at 429 n.2; *see also Farrar v. Hobby*, 506 U.S. 103, 118 (1992) (O'Connor, J., concurring) (stating that whether the plaintiff prevails or not, if a fee award would be unjust, the reasonable fee is no fee); *Indep. Fed'n of Flight Attendants*

v. Zipes, 491 U.S. 754 (1989) (stating that Congress expected courts to consider all competing equities when awarding attorneys' fees; therefore interveners will not be responsible for attorneys' fees unless intervention is "frivolous, unreasonable, or without foundation"); *City of Riverside v. Rivera*, 477 U.S. 561, 576 (1986) (limiting attorneys' fees in civil rights cases to a proportion of the damages award would seriously undermine Congress's purpose in enacting Section 1988); *Evans v. Jeff D.*, 475 U.S. 717 (1986) (noting that Congress did not intend to prohibit all waivers of attorneys' fees under Section 1988); *New York Gas Light Club, Inc. v. Carey*, 447 U.S. 100 (1980) (awarding attorneys' fees for successful work at administrative proceedings furthers Congress's purposes under Title VII).

The Fourth Circuit openly criticized the Ninth Circuit's approach in an IDEA case:

> Prior to *Kay*, the Ninth Circuit suggested that determination of whether "special circumstances" exist in an IDEA case involves examination of 'two factors: (1) whether awarding fees would further the congressional purpose in enacting' IDEA and '(2) the balance of the equities.' *Abu-Sahyun v. Palo Alto Unified Sch. Dist.*, 843 F.2d 1250, 1253 (9th Cir. 1988). Neither the Supreme Court nor this court has embraced this two-part test in subsequent IDEA cases and we decline to do so here. This "test" contains no real standards and provides no legitimate reason for departing from the usual rule of awarding reasonable fees to prevailing plaintiffs under fee-shifting statutes.

Doe, 165 F.3d at 264 n.2. However, this Court decided *Kay v. Ehrler*, 499 U.S. 432 (1991), by determining whether the

award of attorneys' fees to a prevailing *pro se* litigant, who is also an attorney, would further the overriding Congressional purpose for Section 1988:

> In the end, we agree with the Court of Appeals that the overriding statutory concern is the interest in obtaining independent counsel for victims of civil rights violations. We do not, however, rely primarily on the desirability of filtering out meritless claims. Rather, we think Congress was interested in ensuring the effective prosecution of meritorious claims.

Kay, 499 U.S. at 437. The fact that the courts may have to weigh competing Congressional interests when deciding whether special circumstances make an award of attorneys' fees unjust is no reason to reject the Ninth Circuit's test. *Indep. Fed'n of Flight Attendants*, 491 U.S. at 761-62. Awarding attorneys' fees on a meritless claim after this Court has invalidated the theory upon which the plaintiff prevailed not only compounds the injustice to the defendant (whether a damages award or an injunction), but it also obstructs Congress's purpose in adopting Section 1988.

2. This Court's Decision in *Z.J. Gifts* Invalidated the Theory on Which Respondents "Prevailed" on the Merits of This Case

In *City of Littleton, Colorado v. Z.J. Gifts D-4, L.L.C.*, this Court *clarified* what the law is and has been regarding the requirements for "prompt judicial review" of an adult business licensing scheme. 541 U.S. at 776-84. As this Court is aware, *Z.J. Gifts*'s central holding was that ordinary state review procedures, in Colorado as elsewhere, provide constitutionally adequate "prompt judicial

review" of local governments' decisions to deny licenses for adult businesses. *Id.* at 782-84. Specifically, the Court stated:

> In our view, Colorado's ordinary judicial review procedures suffice as long as the courts remain sensitive to the need to prevent First Amendment harms and administer those procedures accordingly. And whether the courts do so is a matter normally left for case-by-case determination rather than a facial challenge.

Id. at 781-82.

In marked contrast to the holding in *Z.J. Gifts*, in its opinion on the underlying merits of this case, the Sixth Circuit Court of Appeals held the following:

> Because Metropolitan Nashville has failed to demonstrate that the denial of a writ would be tantamount to the denial to an applicant of a day in court, we cannot agree that this discretionary writ **guarantees** an aggrieved applicant that a court will hear and decide the merits of her claim as required by *Freedman* [*v. Maryland*, 380 U.S. 51 (1965)].

Deja Vu I, 274 F.3d at 401 (emphasis added).

Very respectfully, the rationale on which the Sixth Circuit held that the 1999 version of Chapter 6.54 and the 1998 version of T.C.A. § 27-9-111 did not provide prompt judicial review is irreconcilable with the clear language of this Court in *Z.J. Gifts*. In fact, the Sixth Circuit continued to rely on its misapplication of the law in its later opinion in *Deja Vu II*, even after the clear direction of this Court in *Z.J. Gifts*. Specifically, in stating that *Z.J. Gifts* arose under "very different circumstances," the Sixth

Circuit noted that the Metropolitan Government's licensing scheme "relied on a discretionary writ of certiorari and thus might lead to no judicial review at all." *Deja Vu II*, 421 F.3d at 422 & n.3. "That," according to the Sixth Circuit Panel majority, "distinguishe[d] this case from the circumstances of *Z.J. Gifts* itself." *Id.* at 422 n.3.

However, the Sixth Circuit's rationale conflicts with the first two considerations that the *Z.J. Gifts* majority used to analyze the Colorado licensing scheme at issue in that case. In *Z.J. Gifts*, this Court declared both that "ordinary court procedural rules and practices, in Colorado as elsewhere, provide reviewing courts with judicial tools sufficient to avoid delay-related First Amendment harm" and that the Court "ha[d] no reason to doubt the willingness of Colorado's judges to exercise" those tools "so as to avoid 'undue delay result[ing] in the unconstitutional suppression of protected speech.'" *Z.J. Gifts*, 541 U.S. at 782 (quoting *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228 (1990)). Moreover, the Court explicitly stated that "whether the courts [remain sensitive to the need to prevent First Amendment harms] is a matter normally fit for case-by-case determination rather than a facial challenge." *Id.*

This case, without question, involved a facial challenge. According to *Z.J. Gifts*, the Sixth Circuit should not doubt the willingness of Tennessee judges to utilize all procedural tools available to them "to avoid delay-related First Amendment harm." *Id.* Just as Colorado's rules of procedure provided the option of expedited review as one such "judicial tool," as pointed out by this Court in *Z.J. Gifts*, the Tennessee writ of certiorari statute provided the opportunity for expedited review. T.C.A. § 27-9-111(e) (1998 version, App. 213a).

Furthermore, both the Sixth Circuit's opinion on the merits and its opinion on the attorneys' fees issue were based, at least in part, on an invalid conclusion that the version of the Tennessee writ of certiorari statute at issue in *Deja Vu I*, the 1998 version, remained "discretionary" by allowing Tennessee judges the option of denying certiorari. 1998 Tennessee Public Acts, Chapter 794, which added subsection (e) to T.C.A. § 27-9-111, actually met the Sixth Circuit's unnecessary "guaranteed" standard of prompt judicial review. The Act stated:

> AN ACT to amend Tennessee Code Annotated, Section 27-9-111, relative to judicial review of certain final orders or judgments of a board or commission ***by requiring the hearing and adjudication of the cases within a specified period***.
>
> BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF TENNESSEE:
>
> SECTION 1. Tennessee Code Annotated, Section 27-9-111, is amended by adding the following language as a new, appropriately designated subsection:
>
> ( ) If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the Constitution of the United States, and either the petitioner or the respondent requests an expedited hearing, the court ***shall hear the matter and issue its decision within forty (40) days of the court granting the writ of certiorari***.

1998 Tenn. Pub. Acts 794 (emphasis added) (App. 272a-274a).[3]

In fact, the Tennessee case on which the Sixth Circuit relied for its conclusion that the writ was still discretionary was a case construing the statute *prior to the 1998 amendment*. *Deja Vu I*, 274 F.3d at 401 (quoting *Boyce v. Williams*, 389 S.W.2d 272, 277 (Tenn. 1965)). As the clear language of the statute indicates, in the context of First Amendment harm, not only is the option of expedited review available, just as in *Z.J. Gifts*, but the statute requires that the "court ***shall hear the matter and issue its decision***." T.C.A. § 27-9-111 (emphasis added) (1998 version, App. 213a).

Moreover, irrespective of the Sixth Circuit's reading of the 1998 writ of certiorari statute, *Z.J. Gifts* dictates that the presumption is that judges will utilize judicial tools, such as the availability of an expedited hearing in the Tennessee writ of certiorari statute, to avoid undue delay in the context of potential First Amendment harm. As such, under *Z.J. Gifts*, the writ of certiorari statute satisfies the "prompt judicial decision" requirement. Even with the Sixth Circuit's reading,[4] Tennessee's "rules provide for

[3] The 1997 version of the writ of certiorari statute did not contain subsection (e). T.C.A. § 27-9-111 (1997 version, App. 215a). Public Chapter 794 (App. 272a-274a) amended the writ of certiorari statute, resulting in the version of § 27-9-111 that was before the Sixth Circuit on the merits and that remained in place until amended again in 2002. T.C.A. § 27-9-111 (1998 version, App. 213a-214a).

[4] Very respectfully, the Sixth Circuit Panel majority is likewise mistaken in its reliance on the 2002 amendment to T.C.A. § 27-9-111(e) as determinative in defeating a claim of "special circumstances." *See Deja Vu II*, 421 F.3d at 422 n.3. Specifically, the Panel majority noted that the fact that what it considered to be the "discretionary" nature of the Tennessee writ was eliminated by the 2002 amendment, after the

(Continued on following page)

a flexible system of review in which judges ***can reach a decision promptly*** in the ordinary case, while using their judicial power to prevent significant harm to First Amendment interests where circumstances require." *Z.J. Gifts*, 541 U.S. at 784 (emphasis added). Pursuant to *Z.J. Gifts*, that is constitutionally sufficient.

Consideration of the third factor utilized in the *Z.J. Gifts* decision likewise reveals how the Sixth Circuit failed to distinguish this case from *Z.J. Gifts* itself. As its third consideration of the ordinance at issue in *Z.J. Gifts*, this Court analyzed whether "the typical First Amendment harm at issue [in the case] differ[ed] from that in *Freedman*." *Id.* at 783. Specifically, this Court answered the question by ascertaining whether the Colorado ordinance utilized "reasonably objective, nondiscretionary criteria unrelated to the content of the expressive materials." *Id.* As did the Colorado ordinance, the Metropolitan Government's licensing scheme at issue in the instant case utilizes objective, or "neutral and nondiscretionary,"

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merits determination in *Deja Vu I*, is a "kind of responsive change [that] cannot create a special circumstance sufficient to defeat an award of attorneys' fees." *Id.* The 2002 amendment, which became necessary after the Sixth Circuit enforced its unnecessary "guaranteed" standard of prompt judicial review and incorrectly held that the Tennessee writ was still discretionary in the context of the First Amendment, included the addition of the phrase "shall immediately grant the writ of certiorari" to the first sentence of subsection (c). *See* Compiler's Notes to T.C.A. § 27-9-111 (2002 version, App. 211a-212a). Even assuming *arguendo* that the writ remained discretionary (which it did not) prior to that amendment, because *Z.J. Gifts* clarified what the law of "prompt judicial review" is and has been, the 2002 amendment simply was not required. In other words, the Metropolitan Government's licensing scheme's constitutionality, for purposes of a "special circumstances" analysis, **is established by virtue of *Z.J. Gifts***, irrespective of the 2002 amendment.

criteria to distinguish between those who may obtain a license or permit and those who may not. *Id.*; Chapter 6.54.050(B) (App. 240a-243a); Chapter 6.54.080 (App. 252a-253a). In fact, the grounds on which a license will be denied under Chapter 6.54 are strikingly similar to the very criteria at issue in *Z.J. Gifts*. Chapter 6.54.050(B) (App. 240a-243a); Chapter 6.54.080 (App. 252a-253a); *Z.J. Gifts*, 541 U.S. at 783. Furthermore, the Metropolitan Government passed Chapter 6.54 to target the secondary effects of the adult entertainment business and not for the purpose of suppressing speech. *See Deja Vu I*, 274 F.3d at 391-92.[5]

Along a similar vein, another portion of the Sixth Circuit's opinion merits mentioning. In rejecting the Metropolitan Government's argument that the "peculiar circumstances" referenced in *Terry* exist in this case, the Panel stated:

> To begin, even if the "peculiar circumstances" described existed here (as they plainly do not), *Terry* would suggest only that an award of fees *might* be unjust. But that concept gives Metro no comfort, for *Terry*'s "peculiar circumstances" are simply not present in this case.
>
> Indeed, in *Z.J. Gifts* the Supreme Court expressly rejected *Metro's view that only prompt judicial access* is required.

Deja Vu II, 421 F.3d at 422 (second emphasis added).

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[5] The fourth criteria utilized by this Court in *Z.J. Gifts* appears to be more of a rule of law than an actual factor under which an ordinance like Chapter 6.54 must be analyzed. The Court stated, "[N]othing in [prior Supreme Court authority in this area] requires a city or a State to place judicial review safeguards all in the city ordinance that sets forth a licensing scheme." *Z.J. Gifts*, 541 U.S. at 784.

Respectfully, in light of the ultimate holding of *Z.J. Gifts*, the Sixth Circuit's focus[6] in this regard is not on point. The fact that the Metropolitan Government, (or the party *against* whom fees were awarded), has at various points in this litigation presented alternative theories or arguments that the Supreme Court rejected is not the appropriate focus of a "special circumstances" inquiry. The

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[6] Moreover, this Court should not accept the Sixth Circuit's language as a pronouncement that the Metropolitan Government has *solely* maintained throughout this litigation that *only access* was required. Like the City of Littleton, Colorado, the Metropolitan Government has argued alternative theories by which it has complied with the prompt judicial review requirement. At multiple stages of this litigation, the Metropolitan Government has recognized the possibility that a judicial *decision* may be required (or *is* required, now that this Court has spoken to the issue). Thus, in 1997, the Metropolitan Government argued in opposition to Respondents' initial motion for an injunction that the possibility for prompt judicial review existed, citing Chapter 6.54, the Local Rules of the Courts of Davidson County, and T.C.A. § 27-9-111. (*See* Mem. Opp. to Mot. Prelim. Inj. at 7-15, App. 353a-362a.) After the district court applied the Sixth Circuit's unnecessary "guarantee" prompt judicial determination standard and enjoined enforcement of Chapter 6.54, the Metropolitan Government petitioned the Tennessee General Assembly, which resulted in 1998 Tenn. Pub. Acts 794 adding subsection (e) to T.C.A. § 27-9-111. The Metropolitan Government also amended Chapter 6.54. The Metropolitan Government moved to dissolve the injunction and again argued that the state courts would and must do their duty and grant the writ of certiorari and issue their decision promptly. (*See* Mem. L. Supp. Mot. Dissolve Prelim. Inj. at 5-10, App. 333a-341a.) As an Appellee before the Sixth Circuit in *Deja Vu I*, the Metropolitan Government again argued that Chapter 6.54 and T.C.A. § 27-9-111 (as amended in 1998) now met the Sixth Circuit's standard of "guaranteeing" prompt judicial review. (*See* Br. of Metro. Gov't Before Sixth Cir. in *Deja Vu I*, Appeal #99-5071, at 14-37, App. 303a-324a.) Again, however, the Metropolitan Government takes the position that any focus on that point is tangential because Respondents did not suffer a civil rights violation.

appropriate inquiry is whether the Supreme Court ultimately rejected the theory upon which the plaintiffs prevailed and ***for which fees were awarded***. In *Z.J. Gifts*, (which, again, simply declared what the law *was* at the time that *Deja Vu I* was decided), this Court did just that. Under such circumstances, an attorneys' fees award to those same plaintiffs is unjust.

In sum, under circumstances such as those in this case, the mandate of this Court is clear: "Where (as here and as in *FW/PBS*) the regulation simply conditions the operation of an adult business on compliance with neutral and nondiscretionary criteria, and does not seek to censor content, an adult business is not entitled to an unusually speedy judicial decision of the *Freedman* type." *Z.J. Gifts*, 541 U.S. at 784 (internal citations omitted). Simply stated, *Z.J. Gifts*, if appropriately applied to this case, reveals that Chapter 6.54 and T.C.A. § 27-9-111(e), as amended in 1998, satisfied the *FW/PBS* "prompt judicial decision" and invalidated the theory upon which Respondents prevailed.

CONCLUSION

For the reasons stated herein, the Metropolitan Government respectfully requests that this Court grant the petition for a writ of certiorari and resolve the conflict among the circuits by declaring that a final judgment on the merits deeming a plaintiff a prevailing party, followed by a decision of this Court invalidating the theory upon which the plaintiff prevailed, qualifies as a special circumstance rendering an attorneys' fees award unjust. In light of *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774

(2004), and the circumstances of this case, the Metropolitan Government respectfully requests that the Court reverse the decision of the Sixth Circuit, remand the case to the district court, and award the plaintiffs only those attorneys' fees incurred prior to dissolution of the first preliminary injunction.

Respectfully submitted,

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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DEJA VU OF NASHVILLE, INC., a Tennessee corporation; JERRY C. PENDERGRASS, et al., *Plaintiffs-Appellees,* *v.* THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, *Defendant-Appellant.*	No. 03-6521

Appeal from the United States District Court
for the Middle District of Tennessee at Nashville.
Nos. 97-01066; 97-01176 – Todd J. Campbell,
District Judge.

Argued: April 20, 2005

Decided and Filed: August 31, 2005

Before: BOGGS, Chief Judge; ROGERS, Circuit Judge;
SHADUR, District Judge.*

ARGUED: Francis H. Young, METROPOLITAN DEPARTMENT OF LAW, Nashville, Tennessee, for Appellant. Bradley J. Shafer, SHAFER & ASSOCIATES, Lansing, Michigan, for Appellees. **ON BRIEF:** Francis H. Young,

* The Honorable Milton I. Shadur, United States District Judge for the Northern District of Illinois, sitting by designation.

James L. Charles, Paul J. Campbell, II, METROPOLITAN DEPARTMENT OF LAW, Nashville, Tennessee, for Appellant. Bradley J. Shafer, Andrea E. Adams, SHAFER & ASSOCIATES, Lansing, Michigan, for Appellees.

SHADUR, D. J., delivered the opinion of the court, in which BOGGS, C. J., joined. ROGERS, J. (pp. 8-9), delivered a separate dissenting opinion.

OPINION

SHADUR, District Judge. Nearly eight years ago Deja Vu[1] first challenged Chapter 6.54 of the Metropolitan Government of Nashville and Davidson County, Tennessee ("Metro") Code of Laws on First and Fourteenth Amendment grounds. That challenge has generated a lengthy and convoluted history that includes an earlier visit to this Court in 2001 (*"Deja Vu I,"* 274 F.3d 377) – so that "deja vu" provides a particularly appropriate label for this second appeal, which concerns the district court's award of attorneys' fees and expenses pursuant to 42 U.S.C. § 1988.[2] We affirm.

---

[1] Originally Deja Vu of Nashville, Inc. filed suit together with Michael Rucker, Michael Butler, Merony Entertainment, Inc. (d/b/a Ken's Gold Club), The Pleasure Palace, Inc., Dawn Pierce and Elizabeth Martz. Later added as plaintiffs as a result of case consolidation were Jerry Pendergrass, 421 Corporation and 822 Corporation. For the sake of simplicity, this opinion will refer to the collectivized plaintiffs as Deja Vu (treated as a singular noun).

[2] All further citations to provisions of Title 42 will take the form "Section –."

Enacted on August 19, 1997, Chapter 6.54 required both (1) "sexually oriented" businesses to obtain operating licenses and (2) performers in such businesses to obtain permits. Deja Vu sought to enjoin its enforcement shortly after enactment. In their initial motion for injunctive relief, the original Deja Vu plaintiffs argued that Chapter 6.54 was unconstitutional because it did not provide prompt judicial review. On December 8, 1997 the district court agreed and entered a preliminary injunction. But almost a year later that injunction was dissolved in response to Metro's amendments to Chapter 6.54. Deja Vu appealed.

Two weeks later, on December 17, 1998, Deja Vu filed in the district court a second motion for a preliminary injunction that asserted its previously preserved constitutional claims. Metro responded in two ways: first by assuring the court that certain provisions would be severed and that others would be "subject to a limiting construction," and then by notifying the court that 92 amendments to the ordinance had been enacted. Even so, Deja Vu's motion was granted on October 4, 1999, with Metro being enjoined from enforcing Chapter 6.54 in its entirety. Some ten weeks later the preliminary injunction was made permanent. Although Metro appealed that order, it also enacted further amendments to the ordinance to address the constitutional infirmities identified by the district court. Metro then appealed again when the district court denied its Fed. R. Civ. P. 60(b) motion to dissolve the injunction based on the new amendments.

In *Deja Vu I* we addressed all of the substantive issues preserved for appeal by both Deja Vu and Metro. We concluded (1) that the injunction against enforcement of Chapter 6.54 should remain in effect because that Chapter's

judicial review provisions were constitutionally inadequate and (2) that the statutory definition of "sexually oriented" was unconstitutionally broad but readily severable. Rehearing and rehearing en banc were denied on February 5, 2002, and the Supreme Court denied certiorari on May 13, 2002 (535 U.S. 1073).

Deja Vu has filed Section 1988 motions for attorneys' fees on four separate occasions during the pendency of the action. Its first effort was an interim motion for fees based on its claimed "prevailing party" status as to the initial motion for preliminary injunction. That motion was eventually deemed a final application for fees after the district court entered the permanent injunction, and Deja Vu followed that entry with a second application based on its success on the second motion for injunctive relief. After we decided *Deja Vu I,* Deja Vu filed a third motion for fees associated with the appeal. And after the Supreme Court denied certiorari, Deja Vu filed its fourth and final motion.

Deja Vu's first three motions were considered together by the magistrate judge, who recommended that the motions be granted but did not recommend a specific award amount. That recommendation was approved by the district court on December 6, 2002, as was the parties' stipulation that the magistrate judge's findings, if upheld, called for an award of $431,099.56. Later the magistrate judge recommended that the fourth motion for $46,870 in fees also be granted and that Deja Vu's motion for costs and expenses (to which Metro had failed to respond) be granted in the amount of $58,565.66. Those recommendations were approved by the district court on September 30, 2003. Metro now appeals the combined award of $536,535.22.

Approval of the Fee Award

When a case is brought under of Section 1983, as this one has been, Section 1988 provides that "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." Although "may allow" has a permissive ring to it, the Supreme Court has read it as mandatory where the plaintiff prevails and special circumstances are absent (*see, e.g., Indep. Fed'n of Flight Attendants v. Zipes,* 491 U.S. 754, 761 (1989)). As to the determination of "prevailing party" status, *Granzeier v. Middleton,* 173 F.3d 568, 577 (6th Cir. 1999) (most citations omitted) has reconfirmed this circuit's standards:

> To be a "prevailing party," a party must "succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." In *Farrar v. Hobby,* 506 U.S. 103, 113 (1992), the Court explained that "a plaintiff 'prevails' when actual relief on the merits of his claim materially alters the legal relationship between the parties . . . in a way that directly benefits the plaintiffs." The Supreme Court has rejected a "central issue test" which would require a party to succeed on the main issue of the litigation to be considered "prevailing." Rather, a party who partially prevails is entitled to an award of attorney's fees commensurate to the party's success.

In its current appeal Metro raises essentially three objections to the fee awards. First, it argues that the Supreme Court's decision in *City of Littleton v. Z.J. Gifts,* 541 U.S. 774 (2004), which was decided after the fees were awarded, has stripped Deja Vu of its status as a "prevailing party." Second, it contends that even if Deja Vu is still

properly considered a "prevailing party," *Z.J. Gifts* introduces "special circumstances" that render an award of fees unjust. Third, it advances the fallback position that even if Deja Vu is properly viewed as a "prevailing party" and even if no "special circumstances" exist, the specific amounts awarded by the district court were excessive and should be modified downward. For the reasons discussed here, we find none of those arguments persuasive.

"Prevailing Party" Status

It is beyond dispute that as of the dates that the attorneys' fees awards were entered, Deja Vu was a prevailing party under the well-established standards for such awards. After all, the net result of the litigation was the entry of a permanent injunction barring enforcement of Chapter 6.54. That certainly qualifies as an enforceable judgment on the merits that "materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiffs" (*Farrar,* 506 U.S. at 111-12).

Metro understandably raises no serious objection along those lines. Instead it argues that the intervening decision in *Z.J. Gifts* has changed the legal landscape so that Deja Vu can no longer be considered a "prevailing party." Specifically, Metro contends that the only justifiable basis for a conclusion that Deja Vu was the prevailing party in the litigation is its success on its first motion for injunctive relief because its success on the second motion was de minimis. And because Metro views *Z.J. Gifts* as eviscerating the basis for Deja Vu's success on the first injunction, it concludes that Deja Vu is left without a predicate for prevailing party status.

On that score Metro's position misunderstands the effect that new decisions have on appeals such as this one. *Harper v. Virginia Department of Taxation,* 509 U.S. 86, 97 (1993) requires that new Supreme Court rulings "must be given full retroactive effect in all cases still open on direct review." As Metro would have it, the pendency of this appeal renders the entire controversy between it and Deja Vu "on direct review," so that any new rule announced in *Z.J. Gifts* would be applicable to our disposition here because of *Harper.*

But because *Harper* is limited to cases "still open on direct review," it is important to understand just what is meant by that language. In that respect the Supreme Court has long recognized a distinction between cases "on direct review" and those involving collateral attack on a final judgment (*see, e.g., Bradley v. Sch. Bd. of the City of Richmond,* 416 U.S. 696, 710-11 (1973)). As to the latter category, judgments become final when "the availability of appeal has been exhausted and lapsed, and the time to petition for certiorari has passed" (*id.* at 711 n.14). Under that standard the December 1999 entry of a permanent injunction against the enforcement of Chapter 6.54 certainly qualified as a final judgment: It was affirmed by this court, and the Supreme Court then denied certiorari.

So *Harper* does not apply as to the injunctive relief that Deja Vu obtained against Metro. Instead the *Harper* principle applies only to the issue that is currently "on direct appeal": the award of attorneys' fees. Metro is entitled to the benefit of any new Supreme Court ruling as to that issue, but *Z.J. Gifts* contains no such ruling (nor does any other case). Hence our analysis as to Deja Vu's qualification as the "prevailing party" is unaffected. Deja Vu conclusively prevailed on its claim under Section 1983

when that claim became final, and it is therefore entitled to "prevailing party" status despite any later changes in the law as announced by the Supreme Court. Non-prevailing parties in civil rights actions cannot, by the simple act of filing a much later appeal from a fee award to which the prevailing party is entitled, artificially extend the time that they are beneficiaries of new Supreme Court rulings beyond the time at which the judgment against them has become final.

Our view of *Harper* is consistent with that of the Second Circuit. *New York State National Organization for Women v. Terry,* 159 F.3d 86 (2d Cir. 1998) reviewed an award of attorneys' fees stemming from a Section 1985(3) claim. As here, the Supreme Court had decided a case that arguably reached the merits of the underlying claim after the final judgment but before the disposition of the appeal as to the fee award. But because the Section 1985(3) judgment was final (and so not on direct review), the plaintiff's right to attorneys' fees under Section 1988 was held to be unaffected (*id.* at 96-97):

> Because plaintiffs were prevailing parties under § 1985(3), they were entitled to an award of attorney's fees under § 1988. This was not affected by the fact that, after the judgment in their favor under § 1985(3) became final, new law declared by the Supreme Court would have made them ineligible for a new judgment under § 1985(3).
>
> * * *
>
> It is true the award of attorney's fees was on direct review when *Bray* [*v. Alexandria Women's Health Clinic,* 506 U.S. 263 (1993)] was decided, and therefore is subject to the retroactive application of any new rule of law announced therein.

> *See Harper* [, 509 U.S. at 97]. *Bray,* however, did not announce a new rule of law with respect to awards of § 1988 attorney's fees. Its new rule related to entitlement to prevail under § 1985(3).

In short, *Z.J. Gifts* cannot upset Deja Vu's status as a prevailing party on its Section 1983 claim. That status became final when the Supreme Court denied certiorari at the earlier stage of this case, and *Harper* does not expose the Section 1983 determination to new Supreme Court developments. Rather, if *Z.J. Gifts* is to affect the fee award at all, it must do so as a "special circumstance" that renders the award unjust.

Special Circumstances

Even a prevailing party may not be entitled to attorneys' fees if "special circumstances would render such an award unjust" (*Hensley v. Eckerhart,* 461 U.S. 424, 429 (1983)). But little guidance has been provided by the Supreme Court as to precisely what constitutes a special circumstance that would defeat a fee award, and we have recently opted for a case-by-case approach rather than adopting a "predetermined formula" (*Wikol ex rel. Wikol v. Birmingham Pub. Schs. Bd. of Educ.,* 360 F.3d 604, 611 (6th Cir. 2004)). In that case-by-case inquiry, the burden is on the non-prevailing party to make a strong showing that "special circumstances warrant a denial of fees" (*Morscott, Inc. v. City of Cleveland,* 936 F.2d 271, 273 (6th Cir. 1991) (citation omitted)).

Metro contends that the decision in *Z.J. Gifts* is the basis for such a showing. To support that notion, it points to a dictum in the Second Circuit's opinion in *Terry,* 159 F.3d at 97:

> [T]he peculiar circumstances of this case – a final judgment confirming plaintiff's status as the prevailing party followed by a Supreme Court decision in another case invalidating the theory on which plaintiffs prevailed – might make unjust the subsequent award of attorney's fees to plaintiffs who would no longer be entitled to prevail on their theory.

That language hardly provides a firm footing for Metro here. To begin, even if the "peculiar circumstances" described existed here (as they plainly do not), *Terry* would suggest only that an award of fees *might* be unjust. But that concept gives Metro no comfort, for *Terry*'s "peculiar circumstances" are simply not present in this case.

Indeed, in *Z.J. Gifts* the Supreme Court expressly rejected Metro's view that only prompt judicial access is required. Instead it specifically held that a prompt judicial decision was also necessary. Thus, discussing its earlier opinion in *FW/PBS, Inc. v. Dallas,* 493 U.S. 215 (1990), the Court concluded (*Z.J. Gifts,* 541 U.S. at 781) (citations omitted):

> A delay in issuing a judicial decision, no less than a delay in obtaining access to a court, can prevent a license from being "issued within a reasonable period of time." Nothing in the opinion suggests the contrary. Thus we read that opinion's reference to "prompt judicial review," together with the similar reference in Justice Brennan's separate opinion (joined by two other Justices), as encompassing a prompt judicial decision. And we reject the city's argument to the contrary.

To be sure, *Z.J. Gifts* went on to find that ordinary state review procedures will often be – and in the particular

case at issue there they were – constitutionally adequate. But that does not foreclose the result that was reached by the district court in this case under very different circumstances.[3] No "special circumstances" or "peculiar circumstances" exist here such as to call for the adoption of a sort of revisionist history that would cause counsel's services, which were compensable when rendered, to be made noncompensable because of a later development that was triggered by those very services.

Determination of Fees and Costs

Finally, we must consider Metro's objections to the specific fee amounts awarded. Essentially Metro contends that the magistrate judge did not adequately account for Deja Vu's limited success on the second motion for injunction.

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[3] That is particularly true given our conclusion in *Deja Vu I*, 274 F.3d at 400-03, that Metro's judicial review provisions failed to meet even a lesser requirement of judicial access because they relied on a discretionary writ of certiorari and thus might lead to no judicial review at all. That distinguishes this case from the circumstances of *Z.J. Gifts* itself. Metro points out that the Tennessee common law writ of certiorari has since been altered to require judicial review in First Amendment cases, although its counsel admitted during oral argument that the alteration was the direct result of this litigation. We express no view as to whether that change in state procedure eliminates the concerns that we expressed in *Deja Vu I*. But even if it did, that kind of responsive change cannot create a special circumstance sufficient to defeat an award of attorneys' fees. In that respect, the dissent's statement that the ordinance "has been [constitutional] all along" – but "with two qualifications" – glosses over the fact that the most critical of those "qualifications" is the very factor that the law of the case (and hence the continued need for lawyering on Deja Vu's part) held to be a constitutional deficiency: the then-existing purely discretionary potential for judicial review.

On that score *Wilson-Simmons v. Lake County Sheriff's Department,* 207 F.3d 818, 823 (6th Cir. 2000) (echoing *Hensley*) has reconfirmed our prior teaching:

> In light of a district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters, an award of attorneys' fees under § 1988 is entitled to substantial deference.

Hence we review awards of attorneys' fees for abuse of discretion, which exists only when a district court "relies upon clearly erroneous factual findings, applies the law improperly, or uses an erroneous legal standard" (*Wikol,* 360 F.3d at 611).

Metro has presented no basis for any such finding here. Prevailing parties who obtain excellent results – as Deja Vu surely did here, and repeatedly so – are generally entitled to a "fully compensatory fee" (*Hensley,* 461 U.S. at 435). In that context we have repeatedly rejected mechanical reductions in fees based on the number of issues on which a plaintiff has prevailed – as *Thurman v. Yellow Freight Systems, Inc.,* 90 F.3d 1160, 1169 (6th Cir. 1996) (citation omitted) has said:

> However, a court should not reduce attorney fees based on a simple ratio of successful claims to claims raised. When claims are based on a common core of facts or are based on related legal theories, for the purpose of calculating attorney fees they should not be treated as distinct claims, and the cost of litigating the related claims should not be reduced.

And that approach is wholly consistent with *Hensley,* 461 U.S. at 435 (citation and footnote omitted):

> In these circumstances the fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. Litigants in good faith may raise alternative legal grounds for a desired outcome, and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing the fee. The result is what matters.

Because the result secured by Deja Vu – a final judgment that permanently enjoined the enforcement of Chapter 6.54 – cannot fairly be labeled as anything short of excellent, it is entitled to a fully compensatory fee. Indeed, the magistrate judge's report and recommendation discounted the fee award by a significant amount to account for the limited success of Deja Vu's second motion, a decision that could perhaps have arrived at a different destination. Because there was no cross-appeal, we have no occasion to review the propriety of that reduction. But there is certainly no basis for Metro to seek a further reduction beyond that already ordered.

Conclusion

Despite the somewhat contorted history of this case, the ultimate impact of the litigation initiated by Deja Vu is beyond dispute: Almost continuously since the lawsuit was initiated, Metro has been permanently enjoined from enforcing the entire Chapter 6.54. That constitutes a legally sanctioned change in the relationship between the two parties more than ample to justify Deja Vu's "prevailing party" status. *Z.J. Gifts* does not affect that status, nor does it introduce any special circumstances that would render an award of fees unjust. Deja Vu is therefore entitled to an award of fees, and nothing about the amount

awarded by the district court represents an abuse of discretion.

Accordingly we AFFIRM the district court's awards of fees and costs.

DISSENT

Rogers, Circuit Judge, dissenting. In my view, in light of *Z.J. Gifts,* the award of fees should be reconsidered.

If ever "exceptional circumstances" warrant denial of fees to a prevailing party, it is when that party had prevailed by obtaining injunctive relief that the party clearly was, in retrospect, never entitled to. That is largely, but not entirely, the case here. *Z.J. Gifts* makes clear that the ordinance at issue is presently constitutional,[1] and, with two qualifications, has been all along. The *Z.J. Gifts* opinion did not "change" the law like a new statute, but made clear what the law is and has been.[2] *See Z.J. Gifts,*

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[1] As the majority notes, the Tennessee common law writ of certiorari has been altered to require judicial review in First Amendment cases. *See* Majority Opinion at n.3; TENN. CODE ANN. § 27-9-111(e) (2002). In *Z.J. Gifts,* the Supreme Court held that "Colorado's ordinary 'judicial review' rules offer adequate assurance, not only that *access* to the courts can be promptly obtained, but also that a judicial *decision* will be promptly forthcoming." 541 U.S. at 781. Because the ordinance at issue is now subject to ordinary judicial review in Tennessee courts, it is constitutional under *Z.J. Gifts.*

[2] As Justice Harlan clearly explained, the Supreme Court "announce[s] new constitutional rules . . . only as a correlative of our dual duty to decide those cases over which we have jurisdiction and to

(Continued on following page)

541 U.S. at 780-81 (applying prior Supreme Court opinions).

The two qualifications are (1) the discretionary nature of judicial review prior to the amendment of the judicial review statute in 2002, and (2) the severable statutory definition of "sexually oriented." While an award of fees may be warranted on a "catalyst" theory for the statutory modification that made judicial review mandatory,[3] such a

---

apply the Federal Constitution as one source of the matrix of governing legal rules." *Mackey v. United States*, 401 U.S. 667, 678-79 (1971) (Harlan, J., concurring and dissenting). Justice Harlan criticized "[t]he notion that cases before us on direct review need not be adjudicated in accordance with those legal principles governing at the time we are possessed of jurisdiction in the case." *Id.* at 679-80. The Supreme Court explained in *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993),

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. . . . "[t]he Court has no more constitutional authority in civil cases than in criminal cases to disregard current law or to treat similarly situated litigants differently." *American Trucking* [*Ass'ns v. Smith*, 496 U.S. 167], at 214 (Stevens, J., dissenting).

509 U.S. at 97.

[3] Indeed, the Tennessee General Assembly explained the amendment in terms of this court's prior ruling:

> WHEREAS, The United States Court of Appeals for the Sixth Circuit held that Tennessee Code Annotated, Section 27-9-111(e), allows state courts discretion as to whether or not to issue a writ of certiorari and hear an appeal from a decision by a board or commission revoking, suspending or denying a license or permit required prior to engaging in conduct protected by the First Amendment to the Constitution of the United States; and

(Continued on following page)

theory should be ruled upon in the first instance by the district court, independently of the injunctive relief that now in light of *Z.J. Gifts* appears unwarranted.[4] The only remaining qualification to the legal invalidity of the injunctive relief is the definition of "sexually oriented," a victory so Pyrrhic that it cannot support a substantial award of fees in this case. I would remand for reconsideration, taking into account the substantial invalidity (in light of *Z.J. Gifts*) of the broad injunctive relief that forms the basis for determining that counsel achieved "excellent results" in this case.

WHEREAS, The United States Court of Appeals for the Sixth Circuit further held that since the grant of the writ of certiorari remains discretionary in such cases, that Tennessee Code Annotated, Section 27-9-111(e), does not guarantee the petitioner prompt judicial review of the board's or commission's decision, as is required by the First Amendment to the Constitution of the United States; now therefore,

. . .

Section 27-9-111, is amended. . . .

2002 TENN. PUB. ACTS 615.

[4] The district court dissolved the injunction on April 27, 2005. Deja Vu's appeal of that order was recently docketed in this court.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 03-6521

DEJA VU OF NASHVILLE, INC., a Tennessee Corporation; JERRY C. PENDERGRASS, et al.,

Plaintiffs – Appellees,

v.

METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,

Defendant – Appellant.

Before: BOGGS, Chief Judge; ROGERS, Circuit Judge; SHADUR, District Judge.

JUDGMENT

(Filed Aug. 31, 2005)

On Appeal from the United States District Court for the Middle District of Tennessee at Nashville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the district court's award of fees and costs is AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

DEJA VU OF NASHVILLE, et al.	)
	) NO. 3:97-1066
v.	) JUDGE CAMPBELL
METROPOLITAN GOVERNMENT of NASHVILLE/ DAVIDSON COUNTY, et al.	) CONSOLIDATED CASES

ORDER

(Entered September 30, 2003)

Pending before the Court are a Report and Recommendation of the Magistrate Judge (Docket No. 283), dated September 16, 2003. The Court has reviewed the findings of the Magistrate Judge and the file.

The Report and Recommendation (Docket No. 283) is APPROVED. Plaintiffs' Fourth Motion for an Award of Attorney Fees (Docket No. 256) is GRANTED, and the Plaintiffs are awarded attorney fees of $46,870.00. In addition, the Plaintiffs' refiled Motion for Costs and Expenses (Docket No. 269) is GRANTED, and the Plaintiffs are awarded costs and expenses of $58,565.66.

IT IS SO ORDERED.

/s/ Todd Campbell
TODD J. CAMPBELL
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC.; MICHAEL RUCKER; MICHAEL BUTLER; MERONEY ENTERTAINMENT, INC.; CAROUSEL AMUSEMENT CENTER, INC.; DAWN PIERCE; and ELIZABETH MARTZ	No. 3-97-1066
v.	
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE,	Consolidated with
and	
EMMITT TURNER, Chief of Police and JERRY C. PENDERGRASS; 822 CORPORATION; and 421 CORPORATION	3-97-1176
v.	
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE	

To: The Honorable Todd J. Campbell, United States District Judge

REPORT AND RECOMMENDATION

(Entered September 16, 2003)

Before the Court is the plaintiffs' fourth application for an award of attorney fees (Docket Entry No. 256)

pursuant to 42 U.S.C. § 1988, and the plaintiffs' refiled motion for costs and expenses (Docket Entry No. 269).

I. BACKGROUND

On August 19, 1997, the Council of the Metropolitan Government of Nashville and Davidson County enacted Chapter 6.54 of the Metropolitan Code, Bill No. 097-796. This chapter, and subsequently enacted amendments to it, required "sexually oriented" businesses to obtain a license to operate and entertainers who perform in such establishments to obtain a permit.

The plaintiffs in this action are adult-oriented establishments, including adult cabarets, adult bookstores, and adult video stores in Metropolitan Nashville and Davidson County, Tennessee, owners and operators of such establishments, and individual dancers who perform at such establishments. The plaintiffs in the first filed case ("the Deja Vu plaintiffs") filed this action under 42 U.S.C. § 1983, on October 17, 1997, against the Metropolitan Government of Nashville and Davidson County and Emmitt Turner in his official capacity as the Chief of Police of the Metropolitan Police Department, seeking a preliminary injunction, and declaratory judgment to determine the constitutionality of Chapter 6.54. On November 10, 1997, the plaintiffs in the second listed action (the "Pendergrass plaintiffs") moved to intervene as plaintiffs in this case, and commenced their own lawsuit, alleging similar claims, and seeking a preliminary injunction.

By order entered December 8, 1997 (Docket Entry No. 23), the two actions were consolidated, mooting the motion of the Pendergrass plaintiffs to intervene, and the defendants were enjoined from enforcing any of the provisions

of Chapter 6.54 because the ordinance failed to provide for prompt judicial review of decisions by the Sexually Oriented Business Licensing Board. The Metropolitan Council subsequently amended the ordinance to correct the defects upon which the preliminary injunction was based, and, by order entered December 3, 1998 (Docket Entry No. 76), the injunction was dissolved. The dissolution of the injunction was appealed to the Sixth Circuit Court of Appeals (Docket Entry No. 94).

By order entered October 4, 1999 (Docket Entry No. 189), the Court granted a second motion for a preliminary injunction that was filed by the plaintiffs, finding that the definitions of "sexually oriented" and "sexually oriented theater," the civil disabilities provision, the disclosure provision, and the fee amounts were unconstitutional. Because the Court found that the offending provisions could not be severed from the ordinance as a whole, the Court enjoined the defendants from enforcing Chapter 6.54 in its entirety.

By order entered December 23, 1999 (Docket Entry No. 199), the preliminary injunction was made permanent and the defendants were permanently enjoined from enforcing Chapter 6.54. The defendants appealed that order (Docket Entry No. 208), and the plaintiffs filed a cross-appeal (Docket Entry No. 212) of a portion of the December 23, 1999, decision. By order entered May 24, 2000 (Docket Entry No. 228), the Court denied the defendants' motion to vacate or dissolve the injunction under Rule 60(b) of the Federal Rules of Civil Procedure because of amendments to the ordinance. The defendants filed a notice of appeal from that order (Docket Entry No. 233).

By mandate issued December 6, 2001, the Sixth Circuit Court of Appeals affirmed in part and reversed in part. Specifically, the Court of Appeals affirmed the District Court's finding that the definitions of "sexually oriented business establishment" and "sexually oriented theater" were not unconstitutionally overbroad, and that the no touch/buffer zone provision was constitutional, but the Court found that the unconstitutionally overbroad definition of "sexually oriented" could easily be severed from the ordinance. The Court also found that the civil disabilities provision, the disclosure provision, and the fee amounts were constitutional, reversing the District Court's finding that such provisions were unconstitutional. *Deja Vu v. Metropolitan Government,* 274 F.3d 377 (6th Cir. 2001). The Court reversed the District Court's finding that the judicial review proceedings were constitutional, and remanded with instructions that the injunction against enforcement of the ordinance should remain until the constitutional problems with the definition of "sexually oriented" and the judicial review procedures were corrected.

Rehearing and rehearing en banc were denied by the Court of Appeals on February 5, 2002, and certiorari was denied by the United States Supreme Court on May 13, 2002.

Four motions for awards of attorney fees were filed by the plaintiffs. The Magistrate Judge issued a Report and Recommendation on October 1, 2002 (Docket Entry No. 265), recommending that the first three motions (Docket Entry Nos. 158, 201, and 240) be granted in part. The Magistrate Judge found that the plaintiffs should not be awarded attorney fees related to claims upon which they did not prevail, and disallowed certain fees. Docket Entry

No. 265, at 13. The Magistrate Judge also noted that there are circumstances in which it is impossible to "separate out with a fine tooth comb the work on one contention advanced from another." *Id.* Thus, although hours not reasonably expended were not compensated, *see Hensley v. Eckerhart,* 461 U.S. 424, 435, 103 S. Ct. 1933, 76 L. Ed. 2d 40 (1983), the plaintiffs were entitled to recover a "fully compensatory fee" that was not reduced "simply because the plaintiff[s] failed to prevail on every contention raised in the lawsuit." *Id.* In addition, the Magistrate Judge found that the amounts sought as expenses should be denied at that time, with leave to the plaintiffs to refile a motion seeking an award of expenses with a detailed explanation of the necessity and propriety of such expenses. The Report and Recommendation was adopted by order entered December 6, 2002 (Docket Entry No. 276).

On June 12, 2002, the plaintiffs filed their fourth motion for attorney fees (Docket Entry No. 256), requesting an additional award of fees in the amount of $48,980.03. On October 17, 2002, the plaintiffs refiled a motion for costs and expenses (Docket Entry No. 269). These motions are the subject of this Report and Recommendation.

II. DISCUSSION

A. The plaintiffs' fourth motion for attorney fees

The plaintiffs' fourth motion requests $46,870.00 in attorney fees and $2,109.03 in costs, for a total of

$48,980.03.[1] Exhibit B to Docket Entry No. 257, at 12. The plaintiffs submit that these fees represent attorney fees and expenses incurred in successfully responding to the defendants' petition for a writ of certiorari filed in the United States Supreme Court, seeking reversal of the decision of the Sixth Circuit in this case; billing related to the preparation and submission of the previously filed attorney fee motions; matters relating to the preparation and submission of this motion; and billings related to attorney fees incurred in opposing this Court's lifting of the first preliminary injunction that can now be claimed given the denial by the United States Supreme Court of the defendants' petition for a writ of certiorari relating to the 'judicial review' issue. Docket Entry No. 258, at 5, ¶ 10. Since the plaintiffs achieved a great deal of success on all of the issues for which they now seek fees, the Court cannot recommend that any of the fees be disallowed.[2]

However, the defendants argue that the rates charged for attorney fees are unreasonable. In the instant motion, the plaintiffs' counsel seek to be reimbursed at an hourly rate of $200.00 per hour for partners and $150.00 an hour for associates for time spent in 1998 and 1999. The defendants object to these rates and argue that any reimbursement for work done in 1998 and 1999 should be charged at rates being charged at that time, i.e., $175.00 per hour for

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[1] The costs requested by the plaintiffs in their fourth motion for fees are incorporated into their refiled motion for costs and expenses (Docket Entry No. 269).

[2] Although the defendants argue that the plaintiffs were not prevailing parties in respect to the first three motions for attorney fees, they do not specifically address any fees requested in the plaintiffs' fourth motion. The plaintiffs are clearly prevailing parties on the matters involved in their fourth motion.

partners and $125.00 per hour for associates, and not their current rates.[3]

In *Missouri v. Jenkins,* 491 U.S. 274, 283, 109 S. Ct. 2463, 105 L. Ed. 2d 229 (1989), the Supreme Court found that "in setting fees for prevailing counsel, the courts have regularly recognized the delay factor, either by basing the award on current rates or by adjusting the fee based on historical rates to reflect its present value." The Sixth Circuit Court of Appeals, found that the holding in *Missouri v. Jenkins* "does not mean that a court should apply the hourly rate at which an attorney currently bills clients. Rather, it means, the court should apply the current market rate for an attorney with the experience the plaintiffs attorney had at the time of the litigation." *Harper v. BP*, 2001 U.S. App. LEXIS 1084, *13, 2001 WL 92139 (6th Cir. Jan. 22, 2001).

The Court finds that the rates of $200.00 per hour for partners and $150.00 per hour for associates is within the current market rate for attorneys with the legal experience plaintiffs' attorneys had during 1998 and 1999, as confirmed by the affidavits filed in support of the attorney fee motions.[4]

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[3] According to the Court's calculations, the plaintiffs' attorney fees requested during 1998 and 1999 equal $10,480.00 of the $46,870.00 in attorney fees requested in the fourth motion. If the Court were to accept the defendants' method of calculation, these fees would be reduced to $8,747.50, a difference of $1,732.50.

[4] In their reply (Docket Entry No. 264), the plaintiffs, for the first time, contend that they are "not only entitled to the higher [current] hourly rates for the limited hours claimed in the fourth motion, but are clearly entitled to these enhanced rates for *all* time expended in pursuit of this litigation." Docket Entry No. 264, at 6. Since the first three motions have already been resolved, this argument is moot.

B. The plaintiffs' refiled motion for costs and expenses

On October 17, 2002, the plaintiffs filed their refiled motion for costs and expenses. Docket Entry No. 269. The plaintiffs also filed a brief in support of this motion. Docket Entry No. 270. In their brief, the plaintiffs include a detailed explanation and description of the necessity and propriety of their costs and expenses. *See* Docket Entry No. 270. The plaintiffs also cite case law in support of their contentions regarding travel related expenses, overnight delivery charges, computer research, and copying expenses. *See id.*[5] Since the defendants have not filed a response to the plaintiffs' refiled motion (Docket Entry No. 269), the Court finds that there is no opposition to the motion. *See* Local Rule 8(b)(3).[6]

III. RECOMMENDATION

For the reasons stated above, it is respectfully recommended that the plaintiffs' fourth motion for an award of attorney fees (Docket Entry No. 256) be GRANTED, the plaintiffs be awarded $46,870.00 in attorney fees, and that the plaintiffs' refiled motion for costs and expenses (Docket

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[5] In the December 6, 2002, Report and Recommendation, the Court noted that all expenses for overnight delivery and delivery service charges should be disallowed. However, in the renewed motion, the plaintiffs have provided a cogent explanation of the necessity of these expenses.

[6] Even if the Court were to construe section 5 of the defendants' objections to the Report and Recommendation (Docket Entry No. 273) as a response, the defendants do not cite any authority in support of their opposition. Without citing any case law in the paragraphs addressing expenses, the defendants essentially argue that the expenses should be discounted on the same basis as the attorney fees were reduced.

Entry No. 269) be GRANTED, and the plaintiffs be awarded $58,565.66 in costs and expenses.

Any objections to this Report and Recommendation must be filed with the Clerk of Court within ten (10) days of receipt of this notice, and must state with particularity the specific portions of this Report and Recommendation to which the objection is made. Failure to file written objections within the specified time can be deemed a waiver of the right to appeal the District Court's order. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

/s/ Juliet Griffin
JULIET GRIFFIN
United States Magistrate Judge

2001 wl 1546311

United States Court of Appeals,
Sixth Circuit.
DEJA VU OF NASHVILLE, INC., a Tennessee corporation; Michael Rucker, individually; Michael Butler, individually; Meroney Entertainment, Inc., d/b/a Ken's Gold Club, a Tennessee corporation; The Pleasure Palace, Inc., a Tennessee corporation; Dawn Pierce, individually; Elizabeth Martz, individually; Jerry C. Pendergrass, individually; The 822 Corporation; The 421 Corporation, Plaintiffs-Appellants, Plaintiffs-Appellees, Plaintiffs-Appellees/Cross-Appellants,
v.
The METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; Emmett Turner, Chief of Police of the Metropolitan Police Department, Defendants-Appellees, Defendants-Appellants, Defendants-Appellants/Cross-Appellees.

Nos. 99-5071, 00-5881, 00-5284, 00-5288.

Argued Jan. 24, 2001.
Decided and Filed Dec. 6, 2001.

Appeal from the United States District Court for the Middle District of Tennessee at Nashville. Nos. 97-01066, 97-01176 – John T. Nixon, Thomas A. Higgins, District Judges.

ARGUED: Bradley J. Shafer, Shafer & Associates, P.C., Lansing, MI, for Plaintiffs.

Karl F. Dean, Metropolitan Government of Nashville & Davidson County, Nashville, TN, for Defendants.

ON BRIEF: Bradley J. Shafer, Andrew K. Wilkins, Shafer & Associates, P.C., Lansing, MI, Michael F. Pleasants, Memphis, TN, H. Louis Sirkin, Laura A. Abrams, Jennifer M. Kinsley, Sirkin, Pinales, Mezibov & Schwartz, Cincinnati, OH, John E. Herbison, for Plaintiffs. Francis H. Young, Shayna R. Abrams, Metropolitan Department of Law, Nashville, TN, for Defendants.

Before: MARTIN, Chief Judge; WELLFORD and SUHRHEINRICH, Circuit Judges.

OPINION

BOYCE F. MARTIN, JR., Chief Judge.

On August 19, 1997, the Council for the Metropolitan Government of Nashville and Davidson County, Tennessee, passed an ordinance, now codified as Metropolitan Code of Laws Chapter 6.54, "Sexually Oriented Businesses," containing licensing requirements for adult entertainment businesses. Shortly thereafter, plaintiffs in this consolidated appeal filed suit in federal court to enjoin the Ordinance's enforcement on First and Fourteenth Amendment grounds. Since that time, injunctions have been issued, dissolved, and issued anew in response to the four amended versions of the Ordinance enacted by Metropolitan Nashville during the four-year pendency of this litigation.[1] The parties now appeal and cross-appeal

[1] Although Metropolitan Nashville has enacted four new versions of the Ordinance in response to various rulings by the district court, with the most recent version enacted in 2000, only the 1999 version is

(Continued on following page)

various aspects of the district court's injunctive and procedural rulings.

I.

The Ordinance requires all "sexually oriented businesses" to obtain a license issued by the Sexually Oriented Businesses Licensing Board before being permitted to operate. *See* Metropolitan Code of Laws § 6.54.030(A). Additionally, all entertainers working within a sexually oriented business must obtain a permit from the Board. *See* M.C.L. § 6.54.060(A). The permit requirements are essentially identical to the license requirements. *See* M.C.L. § 6.54.080(A). Licenses and permits must be renewed on a yearly basis, and can be suspended or revoked for, among other things, repeated failure to comply with any of the licensing or permitting requirements, failure to pay required fees, or knowingly denying access to law enforcement personnel during business hours. *See* M.C.L. §§ 6.54.110; 6.54.150(A)(2), (3), and (6). The Ordinance includes a civil disability provision (M.C.L. §§ 6.54.050(B)(2); 6.54.080(A)(2)), a disclosure provision (M.C.L. §§ 6.54.040(A)(5); 6.54.070(A)(4)), and a no-touch/buffer zone provision (M.C.L. § 6.54.140(C)), applicable to all license and permit-seekers. Metropolitan Nashville charges applicants five hundred dollars to apply for a license, and one hundred dollars to apply for a permit. *See* M.C.L. § 6.54.090.

The plaintiffs are a group of establishments and individuals providing adult entertainment in the form of

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relevant to this appeal. Every citation thus will be to the 1999 version unless otherwise noted.

live nude or semi-nude performance dance, as well as selling, renting or presenting sexually oriented books, magazines, and videos. The "Deja Vu plaintiffs" include four corporations, two owner/operators, and two dancers. The "Pendergrass plaintiffs" include two corporations and one owner/operator. All the plaintiffs fall within the Ordinance's definitions of either "sexually oriented business," "operator," or "entertainer," and thus each is subject to the Ordinance's requirements. *See* M.C.L. §§ 6.54.010(G), (P), and (Y), respectively.

In October 1997, the Deja Vu plaintiffs sought a preliminary injunction based solely on the ground that the Ordinance failed to provide prompt judicial review of licensing decisions by the Board. The Deja Vu plaintiffs reserved their right to request a future preliminary injunction on other grounds. Shortly thereafter, the Pendergrass plaintiffs filed a similar complaint, requesting a preliminary injunction on the grounds that the Ordinance failed to provide prompt judicial review of licensing decisions and that its civil disability provisions violated the First Amendment. On December 11, the district court consolidated the two cases and granted a preliminary injunction because the Ordinance failed to provide for prompt judicial review; the district court did not address the constitutionality of the disability provisions. Metropolitan Nashville subsequently amended the Ordinance, and, on December 7, 1998, the district court dissolved the preliminary injunction. The plaintiffs timely appealed the dissolution.

The plaintiffs also moved for another preliminary injunction, raising all of their constitutional challenges to the Ordinance. On October 1, 1999, the district court granted the motion, finding the definitions of "sexually

oriented" and "sexually oriented theater," the civil disabilities provision, the disclosure provision, and the fee amounts unconstitutional. The court further found that the tainted provisions could not be severed, and therefore enjoined the entire Ordinance. In December, the district court made the preliminary injunction permanent. Metropolitan Nashville timely appealed the district court's decision striking down the definitions and the civil disability, disclosure, and fee provisions; the refusal to sever the tainted provisions; and the imposition of the permanent injunction. The plaintiffs timely cross-appealed the district court's decision upholding the Ordinance's definition of "sexually oriented business/establishment" and the buffer zone/no-touch provision. The plaintiffs also appealed the district court's grant of a protective order to Metropolitan Nashville.

In early 2000, Metropolitan Nashville again amended the Ordinance to remove the portions that the district court found unconstitutional, and then filed a Rule 60(b) motion to dissolve the injunction with the district court. The district court denied the motion on the grounds that it no longer had jurisdiction over the case because Metropolitan Nashville had already appealed its judgment to this Court. Metropolitan Nashville timely appealed that decision as well.

II.

As an initial matter, we note that none of Metropolitan Nashville's issues on appeal have been rendered moot by the current version of the Ordinance, which was enacted in early 2000. "[A] defendant's voluntary cessation of a challenged practice does not deprive a federal court of its

power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). Here, Metropolitan Nashville explicitly enacted the 2000 version in order to enforce the Ordinance pending this appeal. It has repeatedly expressed its intention to reenact those portions of the Ordinance judged unconstitutional by the district court at the earliest opportunity. Accordingly, we must now address the constitutionality of the following portions of the Ordinance: the definitions of "sexually oriented," "sexually oriented business/ establishment," and "sexually oriented theater;" the civil disability provision; the disclosure provision; the fees provision; the buffer zone/ no touch provision; and the mechanisms provided for judicial review. We review a district court's decision to grant or deny a permanent injunction, including both its factual and legal conclusions, *de novo* when constitutional facts are at issue. *See Women's Medical Professional Corp. v. Voinovich*, 130 F.3d 187, 192 (6th Cir.1997). All other factual findings are reviewed for clear error. *See Id.*

A.

First, we must examine the Ordinance's definitions of "sexually oriented," "sexually oriented business/ establishment," and "sexually oriented theater" to determine whether they are unconstitutionally overbroad. A law is overbroad under the First Amendment if it "reaches a substantial number of impermissible applications" relative to the law's legitimate sweep. *New York v. Ferber*, 458 U.S. 747, 771 (1982). The overbreadth doctrine exists "to prevent the chilling of future protected expression." *Staley v. Jones*, 239 F.3d 769, 779 (6th Cir.2001). Therefore, any law imposing restrictions so broad that it chills speech

outside the purview of its legitimate regulatory purpose will be struck down. For the same reason, the plaintiffs have standing to challenge the Ordinance's overbreadth even though they do not dispute that the Ordinance applies to each of them. "The overbreadth doctrine constitutes an exception to traditional rules of standing" and allows claimants to assert the rights of parties not before the court. *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 135 (6th Cir.1994).

We agree with the district court that the definition of "sexually oriented" is unconstitutionally overbroad. In relevant part, the Ordinance defines "sexually oriented" as "any exhibition of any motion pictures, films or videos depicting 'specified sexual activities' or 'specified anatomical areas.'" M.C.L. § 6.54.070(Y). "Specified anatomical areas" include "[l]ess than completely and opaquely covered" buttocks and female breasts. M.C.L. § 6.54.010(BB). Thus, any movie or video featuring a single shot of a person's nude or partially-covered buttocks or a woman's partially covered breast is a "sexually oriented" film under the Ordinance, irrespective of whether the film's content constitutes "adult entertainment" or causes the type of secondary effects, such as crime (sexual and nonsexual) and public health risks, that Metropolitan Nashville seeks to regulate. Because this definition could apply to a range of expression that does not cause the secondary effects that the Ordinance was aimed to prevent, it is overbroad.

We do not, however, find the definition of "sexually oriented business/establishment" overbroad. The Ordinance defines a "sexually oriented business/establishment" at Section 6.54.010(Z) as:

> Any commercial establishment which for a fee or incidentally to another service, regularly presents material or exhibitions distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observations by patrons therein.

Four subsections then follow this definition, defining the terms "sexually oriented bookstore," "sexually oriented nightclub," "sexually oriented theater," and "sexually oriented video store." M.C.L. §§ 6.54.010(Z)(1)-(4). If the "sexually oriented business/establishment" definition stood alone, we would find it unconstitutionally overbroad, as it could encompass such businesses as a hotel that offers its guests access to an adult cable channel. The record reflects, however, that a business will be subject to the Ordinance's licensing requirements only if the business satisfies both the "sexually oriented business/establishment" definition *and* one of the four subsections' definitions. When read in conjunction with the four subsections, the definition no longer sweeps too broadly.

For the same reason, we find no constitutional problem with the Ordinance's definition of "sexually oriented theater," the only subsection definition challenged by the plaintiffs on appeal. "Sexually oriented theater," defined in Section 6.54.010(Z)(3), means:

> [A]n enclosed area, not including a booth, regularly used for presenting films, motion pictures, videocassettes, slides, or other photographic reproductions or other material depicting, describing, or relating to "specified sexual activities" or "specified anatomical areas," as defined in this section, for observation by patrons therein.

"Specified sexual activities" include sexual intercourse *and fondling of* buttocks or breasts. *See* M.C.L. § 5.43.010(CC). A significant number of mainstream movies depict people fondling breasts or buttocks, and an even larger number "relate to" sex. Again, the risk that this definition might chill a range of protected speech would require us to find it unconstitutionally overbroad if it stood alone. The additional requirement of being a "sexually oriented business/establishment," however, narrows the Ordinance's application to those theaters that regularly present material distinguished or characterized by an emphasis on sex acts or particular body parts. Again, reading the definitions together saves the parts from overbreadth.[2]

Finally, even though we find the Ordinance's definition of "sexually oriented" overbroad, we must, if possible, give effect to the Ordinance's severability clause so as not to invalidate the entire act. *See Moore v. Fowinkle*, 512 F.2d 629, 637 (6th Cir.1975). By including a severability clause, found at Section 6.54.170, Metropolitan Nashville created a presumption that it did not intend the statute's validity to hinge on any constitutionally infirm provision. *See Immigration & Naturalization Serv. v. Chadha*, 462

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[2] We note that these constitutional issues would never have arisen had the Ordinance been written more clearly. Section 6.54.010(Z) could have simply stated that its definition must be read in conjunction with its subsections. Alternatively, the Ordinance could have defined "sexually oriented business/establishment" at Section 6.54.010(Z) as "any one of the following businesses," and then listed the four businesses currently defined in the subsections (with the necessary limiting language incorporated into each business's definition). Whatever the difficulties inherent in writing laws, it is not too much to ask that municipalities carefully draft legislation intended to regulate protected activities.

U.S. 919, 932 (1983). We find that the definition of "sexually oriented" can easily be severed from the Ordinance without having any impact on the licensing scheme. In fact, we are a bit confused as to why this definition had to be litigated at all, as Metropolitan Nashville argues strenuously in its brief that it is superfluous. Our independent review of the Ordinance reveals that, indeed, the phrase "sexually oriented" is never used but in conjunction with some other word that has its own definition. *See generally* § 6.54.010 (containing definitions of "sexually oriented films," "sexually oriented theaters," and "sexually oriented nightclubs," to name a few). For whatever reason, Metropolitan Nashville saw fit to have us decide whether this apparently meaningless term must be removed from its Ordinance. We have and it must.

B.

Metropolitan Nashville next appeals the district court's decision that the Ordinance's "civil disabilities provisions" violate the First Amendment. Under those provisions, no individual license or permit applicant who has had a misdemeanor conviction for a crime of a sexual nature may receive a license or permit for two years following the date of the conviction.[3] *See* M.C.L. §§ 6.54.050(B)(2)(a);

[3] The following constitute "crimes of a sexual nature" under the Ordinance: "the crimes of rape, aggravated rape, aggravated sexual assault, public indecency, statutory rape, rape of a child, sexual exploitation of a minor, indecent exposure, prostitution, patronizing prostitution, promoting prostitution, obscenity, or crimes committed in a jurisdiction other than Tennessee which, if committed in this state, would have constituted the crimes listed above. In the event that a felony from a jurisdiction other than Tennessee is not a named felony in this state, the elements of the offense shall be used to determine what classification the offense is given." M.C.L. § 6.54.010(D).

6.54.080(A)(2)(a). No applicant who has had a felony conviction for a crime of a sexual nature may receive a license or permit for five years following the date of the conviction. *See* §§ 6.54.050(B)(2)(b); 6.54.080(A)(2)(b).

To satisfy Article III's standing requirement, (1) a plaintiff must have suffered some actual or threatened injury due to the alleged illegal conduct of the defendant; (2) the injury must be "fairly traceable" to the challenged action; and (3) there must be a substantial likelihood that the relief requested will redress or prevent the plaintiff's injury. *See Coyne v. American Tobacco Co.*, 183 F.3d 488, 494 (6th Cir.1999). The Supreme Court has further defined the injury-in-fact requirement by stating that a plaintiff must show "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

Plaintiffs Deja Vu and Michael Butler, Deja Vu's former Vice-President, are the only Deja Vu plaintiffs who allege they have standing to challenge the civil disabilities provisions because Butler was convicted of statutory rape in 1995. Although they acknowledge Butler no longer works for Deja Vu, they claim that he quit his job only because Deja Vu was forced to seek a license in 1999, after the district court dissolved the first preliminary injunction and denied plaintiffs a stay pending its decision on their motion for a second preliminary injunction. Therefore, Deja Vu and Butler contend they were forced to choose between the "Scylla of intentionally flouting state law and the Charybdis of forgoing what [they believed] to be constitutionally protected activity." *Steffel v. Thompson*, 415 U.S. 452, 462 (1974). They argue that they should not be denied standing to challenge the civil disabilities

provisions merely because Butler no longer works for Deja Vu, when it was the enforcement of that very provision that forced Butler to resign.

Although attractive, this argument has no merit under standing jurisprudence. Because Deja Vu does not currently employ anyone who could arguably be subjected to the disabilities provisions, any threat it alleges with regard to those provisions is, by definition, hypothetical. Hypothetical injury does not equal injury-in-fact. *See Lujan*, 504 U.S. at 560. Moreover, Deja Vu did not rehire Butler as Vice President when the district court enjoined enforcement of the civil disabilities provisions, nor does it allege any plans to do so should we uphold that injunction. Similarly, Butler does not allege he would seek such a job were it not for the disabilities provisions. Therefore, neither plaintiff has suffered a harm likely to be redressed by a favorable decision. *See Coyne*, 183 F.3d at 494 (citing *Valley Forge Christian Coll. v. Americans United for Separation of Church & State*, 454 U.S. 464, 472 (1982)). Because none of the other individual plaintiffs alleged that the civil disability provisions rendered them ineligible to receive a permit, we agree with Metropolitan Nashville that none of the Deja Vu plaintiffs have standing to challenge the civil disabilities provisions.

We find, however, that the Pendergrass plaintiffs do have standing to challenge the provisions. At the time the district court ruled on this issue, Jerry Pendergrass was an officer, a director, and the sole shareholder of the 822 Corporation. Pendergrass was convicted of a misdemeanor obscenity offense on May 22, 1997, and he was required to apply for a license by March 15, 1999, within two years of the date of his conviction. Because of the civil disabilities

provisions, Pendergrass, and consequently the 822 Corporation, was ineligible to receive an operating license. Accordingly, both parties have standing to challenge those provisions.

The Pendergrass plaintiffs' challenge has not been mooted merely because over two years have passed and his business now possesses an operating license, as this case falls squarely within the "capable of repetition, yet evading review" exception to mootness. *See Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). Under this exception, the Pendergrass plaintiffs must show that 1) the challenged action will be of a duration too short to be fully litigated prior to its cessation or expiration, and 2) there is a "reasonable expectation that the same complaining party will be subjected to the same action again." *Id.* Even if an applicant seeks a license the day after his or her misdemeanor conviction, that still leaves only two years for the applicant to exhaust the Ordinance's application and appeal procedures and fully litigate the claim in the federal courts. As a practical matter, this cannot be done. Additionally, because the range of disabling sex crimes is relatively large, and because, as Metropolitan Nashville itself points out, it is reasonably foreseeable that someone with a sex crime history will choose to work for or be involved with a sexually oriented business, there is a reasonable probability that a future person connected with the 822 Corporation will have a criminal history that renders the Corporation ineligible for a license under the civil disabilities provisions. Therefore, we will proceed to the merits of the plaintiffs' claim.

"[N]ude dancing of the type at issue here is expressive conduct," which falls "within the outer ambit of the First Amendment's protection." *City of Erie v. Pap's A.M.*, 529

U.S. 277, 289 (2000) (plurality opinion). Therefore, any ordinance regulating nude dancing must be analyzed to ensure it does not unduly impair the exercise of First Amendment rights. The level of scrutiny we apply depends on the type of regulation we address. For instance, if the challenged law is "content based," that is, intended to impact speech, the law must survive strict scrutiny. *See Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994). "In contrast, regulations that are unrelated to the content of speech are subject to an intermediate level of scrutiny," one which was first enunciated as a four-step test in *United States v. O'Brien*, 391 U.S. 367, 377 (1968). *Turner Broad.*, 512 U.S. at 642. Systems of prior restraint will be upheld only if they provide for prompt judicial review of all decisions denying the right to speak, while also passing the appropriate level of scrutiny. *See Freedman v. State of Maryland*, 380 U.S. 51, 58-59 (1965).

The plaintiffs argue that the Ordinance should be subjected to strict scrutiny because the civil disabilities provisions amount to an unlawful prior restraint in violation of the First Amendment. "A 'prior restraint' exists when speech is conditioned upon the prior approval of public officials," and any system of prior restraint carries a heavy presumption against its validity. *Nightclubs, Inc. v. City of Paducah*, 202 F.3d 884, 889 (6th Cir. 2000). Although the plaintiffs are correct in asserting that the Ordinance constitutes a system of prior restraint, that argument more properly applies to our examination of the Ordinance's mechanisms for providing prompt judicial review, *see* Part II. F, *infra*, rather than our decision of which level of constitutional scrutiny to apply. What the plaintiffs actually, though obliquely, argue here is that the Ordinance is content-based, and thus must withstand

strict scrutiny. *See, e.g., Turner Broad.*, 512 U.S. at 642. Metropolitan Nashville responds that the Ordinance is a content-neutral regulation aimed at redressing the secondary effects of sexually oriented businesses that must satisfy the less-demanding four-part test of *O'Brien*.

We have previously recognized that ordinances aimed at regulating adult entertainment businesses constitute content-based regulations, but that "a distinction may be drawn between adult [businesses] and other kinds of [businesses] without violating the government's paramount obligation of neutrality" when the government seeks to regulate only the secondary effects of erotic speech, and not the speech itself. *Richland Bookmart, Inc. v. Nichols*, 137 F.3d 435, 440 (6th Cir.1998). To withstand constitutional scrutiny, then, (1) the Ordinance must have been enacted within Metropolitan Nashville's constitutional power; (2) the Ordinance must further a substantial governmental interest; (3) the interest must be unrelated to the suppression of speech; and (4) the Ordinance may pose only an "incidental burden on First Amendment freedoms that is no greater than is essential to further the government interest." *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 226 (6th Cir.1995) (citing *O'Brien*, 391 U.S. at 377).

The parties agree that Metropolitan Nashville validly enacted the Ordinance. Additionally, Metropolitan Nashville's stated interests in reducing crime, open sex, and the solicitation of sex are substantial. *See Richland Bookmart, Inc.*, 137 F.3d at 440. Moreover, regulations aimed at redressing the secondary effects of the sex industry are unrelated to the suppression of erotic speech. *See East Brooks Books, Inc.*, 48 F.3d at 226. Therefore, we need only determine whether the Ordinance's civil disabilities

provisions constitute merely an incidental burden on the plaintiffs' First Amendment rights that is essential to furthering Metropolitan Nashville's stated interest in battling the secondary effects of the sex industry.

The Supreme Court has recently noted that "crime and other public health and safety problems are caused by the presence of nude dancing establishments. . . . " *Pap's A.M.*, 529 U.S. at 300. The Ordinance's civil disabilities provisions serve to weed out those applicants most likely to engage in the type of criminal behavior that the Ordinance seeks to redress by temporarily disqualifying those who have recently committed such acts from working for sexually oriented establishments, or alternatively, from declaring any sexually oriented establishment closely associated with such an individual ineligible to operate. In light of the temporary nature of the ban and the narrow reach of the provisions (applying only to those who have committed a felony sex crime within the last five years or a misdemeanor sex crime within the last two years), we do not find that these provisions violate the Constitution.

Contrary to the plaintiffs' arguments, our holding in *City of Paducah v. Investment Entm't, Inc.*, 791 F.2d 463 (6th Cir.1986), does not control this case. In *City of Paducah*, we invalidated a municipal regulation that revoked all business licenses and permits from those businesses whose employees had distributed or exhibited obscene material. *See City of Paducah*, 791 F.2d at 464. In that case, however, we explicitly found that the purpose of the challenged portion of the regulation was "to control future expression by businesses that have been subjected to the nuisance abatement procedure." *Id.* at 470. In contrast, we find here that the Ordinance's civil disabilities provisions exist to combat the sex crimes connected with sexually

oriented establishments by temporarily prohibiting those recently convicted of such crimes from employment with those establishments. Because both the Ordinance and the civil disabilities provisions are unrelated to speech, we are faced with a different issue than that decided in *City of Paducah*. Furthermore, because *City of Paducah* was a "prior restraint" case, it was concerned with whether the regulation at issue provided sufficient mechanisms for prompt judicial review. *See Id.* We agree that the instant Ordinance must provide for prompt judicial review, and that such review must encompass any findings of ineligibility pursuant to the civil disabilities provisions. *See* Part II. F, *infra*. Nothing in the civil disabilities provisions themselves, however, renders them facially unconstitutional, and we decline to tie the hands of local governments by extending *City of Paducah's* reasoning to those regulations aimed only at redressing the secondary effects of the sex entertainment industry.

C.

Because the district court found the Ordinance's civil disabilities provisions unconstitutional, it also invalidated its "disclosure provisions" which require that applicants provide certain information in order to conduct a background check into each applicant's criminal history. The disclosure provisions require that license and permit applicants divulge such personal information as full name, height, weight, hair color, eye color, date of birth, current residential address, and all residential addresses for the prior three years. *See* §§ 6.54.040(A)(5)(a), (b), and (c); 6.54.070(A)(4)(a), (b), (c), and (d). Additionally, applicants must provide their fingerprints and two portrait photographs to facilitate the background check, which the

Metropolitan Police Department conducts. *See* §§ 6.54.040(A)(5)(g); 6.54.070(A)(4)(g). Because each plaintiff either has or will have to apply for either a permit or a license, all are required to provide this information to the Board. Accordingly, all the plaintiffs have standing to challenge this provision.

The Ordinance states that the required disclosures are "for the purpose of facilitating the police investigation into the applicant's criminal background regarding crimes of a sexual nature." *See* M.C.L. § 6.54.040(A)(5)(c); M.C.L. § 6.54.070(A)(4)(c); M.C.L. § 6.54.070(A)(4)(d). Because this purpose is "unrelated to the suppression of expression," we again apply the four-part *O'Brien* test to determine whether the disclosure provisions are unconstitutional. *Pap's A.M.*, 529 U.S. at 289.

As stated above, *O'Brien* requires us to determine whether Metropolitan Nashville enacted the disclosure provisions (1) within its constitutional power, (2) to further a substantial governmental interest that is (3) unrelated to the suppression of speech, and whether (4) the provisions pose only an "incidental burden on First Amendment freedoms that is no greater than is essential to further the government interest." *East Brooks Books, Inc.*, 48 F.3d at 226. Here, Metropolitan Nashville legitimately enacted the disclosure provisions in order to facilitate the background check. In addition, the required disclosures ensure continuing compliance with the Ordinance's licensing and permitting requirements. Although the plaintiffs point to testimony by Metropolitan Police Department Vice Squad Captain Bawcum that only a person's name and date of birth are used to run a background check, they do not argue that the required disclosures do not further Metropolitan Nashville's substantial governmental interest in

eradicating the secondary effects of sexually oriented businesses.[4] "States are not required to convince the courts of the correctness of their legislative judgments. Rather, 'those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decision maker.'" *Borman's, Inc. v. Mich. Prop. & Cas. Guar. Assoc.*, 925 F.2d 160, 162 (6th Cir.1991) (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979)). The plaintiffs have failed to convince us that requiring identifying information as part of the application process does not facilitate enforcement of the Ordinance's provisions (for instance, by assuring that the entertainer displaying the permit matches the physical description contained in the applicant's file). The provisions thus satisfy the first, second, and third parts of the *O'Brien* test.

The plaintiffs argue that the disclosure provisions fail the fourth prong, however, because under the Tennessee Open Records Act, members of the public with illicit motives can easily obtain the personal information contained in the plaintiffs' application files, which includes their names and residential addresses. Therefore, the provisions will pose more than an incidental burden on

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[4] Simply because Metropolitan Nashville codified only its interest in facilitating the background checks as the justification for the required disclosures, we are not prohibited from taking into account other interests the disclosures may serve. "Our appropriate focus is not an empirical inquiry into the actual intent of the enacting legislature, but rather the existence or not of a current governmental interest in the service of which the challenged application of the statute may be constitutional." *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 582 (1991) (Souter, J., concurring in the judgment).

First Amendment activities because those wishing to engage in such activities will be chilled by the threat of public exposure and possible violence. *See, e.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) (stating purpose of First Amendment is "to protect unpopular individuals from retaliation – and their ideas from suppression"). Metropolitan Nashville responds that the required information is protected from public release (1) by the district court's order; (2) by Metropolitan Nashville's own opinion; (3) by the Tennessee Attorney General's opinion; and (4) by our decision in *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1064-65 (6th Cir.1998) (finding release of certain personnel information constitutionally prohibited).

Metropolitan Nashville's first three arguments cannot stand. First, the district court sealed the application files only "during the pendency of this litigation," and therefore its order is insufficient to protect any applicant's information indefinitely. Second, neither Metropolitan Nashville nor the Tennessee Attorney General have the power to create exceptions to Tennessee's Open Records Act. The Tennessee Supreme Court has interpreted the Tennessee Open Records Act, T.C.A. § 10-7-503(a), to mean that "the legislature reserved to itself alone the power to make public policy exceptions." *Memphis Publ'g Co. v. City of Memphis*, 871 S.W.2d 681, 685 (Tenn.1994) (quoting *Memphis Publ'g Co. v. Holt*, 710 S.W.2d 513, 517 (Tenn.1986)). Nonetheless, we agree with Metropolitan Nashville that our decision in *Kallstrom* saves this provision from being unconstitutional by prohibiting public release of all applicants' names and current and past residential addresses.

Kallstrom held that police officers have a constitutionally protected privacy interest in their otherwise-public personnel file information, which includes addresses, phone numbers, and family member information, when the release of that information creates "a very real threat to the officers' and their family members' personal security and bodily integrity, and possibly their lives." *Kallstrom*, 136 F.3d at 1063. Here, the plaintiffs presented significant evidence that the requirement that applicants submit their names and past and current addresses to a public forum poses serious risks to their personal security. For instance, plaintiff Dawn Pierce, an entertainer at Deja Vu, testified that entertainers in the past have been stalked, harassed, and injured by customers, and that she is afraid to make public her name and residential address, as required by the Ordinance, because of serious potential risks to her physical safety and well-being. Dancers use stage names and have unpublished addresses and telephone numbers in order to minimize the risks of such harassment. Additionally, Pierce testified that there are a number of local organizations that have taken a strong stance against her profession. She is therefore also concerned that requiring her to release her name and residential address to a public forum will result in such groups harassing her at her home as a result of her choice to engage in erotic speech. Such risks also apply to individual business associates, such as registered agents, officers, directors, certain shareholders, club managers, and assistant managers, all of whom are likely to have to provide their names and addresses to the Board. *See* M.C.L. § 6.54.040(A)(5)(i), (j).

Applying *Kallstrom's* reasoning to this context, we find that all sexually\oriented business license and permit

applicants' names and current and past residential addresses constitute protected private information and are therefore exempted from Tennessee's Open Records Act. Metropolitan Nashville cannot publicly release such private information; it can, however, require applicants to provide the identifying information to the licensing board for the limited purpose of ensuring compliance with the Ordinance's regulations, provided Metropolitan Nashville keeps that information under seal. "Anonymity is a shield from the tyranny of the majority," *McIntyre*, 514 U.S. at 357, but it is not a shield from all legitimate regulation. Therefore, as a result of our decision in *Kallstrom*, prohibiting public dissemination of the required private information, Metropolitan Nashville's disclosure requirements satisfy the fourth part of *O'Brien* because they are essential to ensuring continuing compliance with the Ordinance's licensing and permitting requirements, and because the reporting requirements pose only an incidental burden on applicants.

D.

The plaintiffs next challenge the constitutionality of the fees charged pursuant to the Ordinance. The government may not tax the exercise of a constitutionally protected right. *See Northeast Ohio Coalition for the Homeless v. City of Cleveland*, 105 F.3d 1107, 1109 (6th Cir.1997). Nonetheless, "an ordinance requiring a person to pay a license or permit fee before he can engage in a constitutionally protected activity does not violate the Constitution so long as the purpose of charging the fee is limited to defraying expenses incurred in furtherance of a legitimate state activity." *Id.* at 1109-10. Such a fee is not excessive, even if it is more than nominal, so long as it is "reasonably

related to the expenses incident to the administration of the ordinance." *Id.* at 1110.

The Ordinance charges applicants five hundred dollars for a license, and one hundred dollars for a permit. Additionally, the Ordinance requires that "[i]f the [license or permit] application is denied, one-half of the fee shall be returned." *See* M.C.L. § 6.54.090(A), (B). Although the district court found the direct cost of processing license applications was thirty-three dollars, and the direct cost of processing permit applications was forty-three dollars, it failed to include in its calculations the $40,000 paid annually to an inspector "to enforce the civil disabilities provision," because it had already held that provision unconstitutional. The record reflects that comparing the yearly total of estimated fee revenue with the annual costs of enforcing the Ordinance results in a net loss to Metropolitan Nashville. Accordingly, we find that the fees charged are reasonably related to the expenses incident to the administration of the Ordinance.

E.

Next the plaintiffs raise challenges to the Ordinance's "no touch/buffer zone" provision. Section 6.54.140(C) states that

> No customer shall be permitted to have any physical contact with any entertainer on the licensed premises while the entertainer is engaged in a performance of live sexually oriented entertainment. All performances of live sexually oriented entertainment shall only occur upon a stage at least eighteen inches above the immediate floor level and removed at least three feet from the nearest customer.

As with any other violation of Chapter 6.54, one violation of the buffer zone may result in a five hundred dollar fine, suspension of the operating license for between five and thirty days, or both. *See* M.C.L. § 6.54.150(B)(2). A second violation within a two-year period requires suspension for between thirty-one and ninety days. *See* M.C.L. § 6.54.150(B)(3). A third violation will result in a one-year revocation of the license. *See* M.C.L. § 6.54.150(C)(9).

As an initial matter, we note that the three-foot buffer zone surrounds the stage, not the dancer. Therefore, we reject the plaintiffs' argument that the provision creates a "floating buffer zone." *See* M.C.L. § 6.54.140(C); M.C.L. § 6.54.050(A)(3) (stating "[a] three-foot boundary from the outer edge of the stage shall be indicated on the floor . . . so that the customer will not invade the three-foot boundary").

We find that this provision also satisfies the *O'Brien* test: Metropolitan Nashville properly passed this portion of the Ordinance pursuant to its police power; it intended this provision to redress the high instances of sex crimes prevalent at sexually oriented businesses and to deter the spread of disease; and requiring dancers to perform on stages removed three feet from any customer poses only an incidental burden on their right to erotic speech that is no greater than is essential to further Metropolitan Nashville's substantial interests. *See DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 412-13 (6th Cir.1997) (upholding six-foot buffer zone to more effectively enforce ban on contact between erotic dancers and audience members and to prevent occurrence of activities likely to result in criminal behavior or to prevent risk of disease).

We agree with the plaintiffs that the First Amendment protects the entertainers and audience members' right to free expressive association. They are certainly engaged in a "collective effort on behalf of shared goals." *See Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). The dancers and customers work together as speaker and audience to create an erotic, sexually-charged atmosphere, and although society may not find that a particularly worthy goal, it is a shared one nonetheless. The right to associate for expressive purposes, however, is not absolute. "Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.* at 623. In attempting to restrict opportunities to engage in prostitution and to guard against the spread of disease through the public release or exchange of bodily fluids, Metropolitan Nashville has gone no farther than necessary by requiring a three-foot distance between the erotic dancer and the audience. *See DLS*, 107 F.3d at 412-13.

The plaintiffs repeat the same arguments we rejected in *DLS*. First, they argue that the no touch/buffer zone provision goes too far because of its economic impact on the relevant market. Specifically, the plaintiffs point to evidence showing that compliance with the no touch/buffer zone provision will require extensive renovations of their clubs. We rejected that argument, however, in *DLS*, noting that the relevant inquiry is not whether the Ordinance will cause any economic impact on the sexually oriented businesses. *Id.* at 413. "[T]he First Amendment requires only that [Metropolitan Nashville] refrain from effectively denying [sexually oriented business owners] a reasonable

opportunity to open and operate an adult theater within the city. . . . " *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 54 (1986). Although we do not doubt that compliance with the Ordinance will cut into the plaintiffs' profits, the plaintiffs have failed to introduce any evidence showing that they will not have a reasonable opportunity to operate their establishments.

Second, the plaintiffs argue that the provision denies to erotic dancers the ability to profit from their expression by foreclosing the possibility of receiving tips. The plaintiffs are correct that the government cannot prohibit compensation for the exercise of First Amendment rights. *See, e.g., Simon & Schuster v. Crime Victims Bd.*, 502 U.S. 105, 115-16 (1991). Customers, however, remain free under the Ordinance to tip dancers before or after their performances. Alternatively, the clubs could decide to increase dancers' salaries, rather than requiring them to earn a living wage from their tips. In any event, the no touch/buffer zone provision merely requires that audience members not hand the dancers money during their dances, a sufficiently limited burden on the plaintiffs' First Amendment rights. For a similar reason, we also reject the plaintiffs' argument that the buffer zone violates the First Amendment by prohibiting all verbal communication between entertainers and customers. Again, if customers and entertainers cannot converse while standing a mere three feet apart, it is because the plaintiffs have chosen to play their music at such a volume that conversation is impossible. Contrary to the plaintiffs' claims, the Ordinance does not force entertainers to choose between verbal communication and no music; as Metropolitan Nashville suggests, the plaintiffs can simply turn their music down a bit. The point is that any problems dancers

may experience with receiving tips or speaking with customers will be caused not by the Ordinance, but by the clubs' refusal to alter their standard operating procedures in response to these constitutional regulations.

Finally, the plaintiffs challenge the no touch/buffer zone provision on the ground that it does not contain a mens rea requirement. As the Ordinance does not expressly limit the prohibited touching to intentional or knowing touches, the plaintiffs claim that even entertainers who merely seek to push a customer away will violate it. We disagree with the plaintiffs' reading of this provision. The provision states, in relevant part, that "[n]o customer shall be permitted to have any physical contact with any entertainer" during a live performance, and that all such performances must occur on a stage "removed at least three feet from the nearest customer." M.C.L. § 6.54.140(C). Rather than reading the provision as enacting two separate requirements, we read it as a single mandate, with the "no touch" portion setting forth a broad policy statement that no contact between dancers and customers shall occur during performances, and the "buffer zone" rule showing the specific way to implement that policy by prohibiting clubs from allowing customers within three feet of the stage during dances. Therefore, the provision places a duty not on the entertainer to avoid touching customers, but on the owners and operators of clubs to protect entertainers from being touched by customers by requiring customers to stay three feet away from the stage. *See also* § 6.54.050(A)(3) (detailing the licensee club's responsibility for noticeably demarcating the three-foot buffer zone). Furthermore, logic compels this interpretation. It would simply be nonsensical for Metropolitan Nashville to put the onus of customer control

on the entertainer who is already removed at least three feet from the customer, is engaged in live entertainment, and is, by definition, incapable of preventing an approaching customer from touching her without engaging in the prohibited touching herself. "[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). Accordingly, we reject the plaintiffs' claim that the no-touch/buffer zone provision imposes *any* duty on entertainers, much less one that requires them to be held strictly liable for any violations.

Moreover, the Ordinance does not allow for strict liability, even for licensees. Section 6.54.150(B)(1) states that a club will be fined or have its license suspended (or both) for violating any of the Ordinance's provisions. However, Subsection (B)(1) also affords licensees the affirmative defense that management was "powerless to prevent" the violation. Accordingly, liability for violating the no-touch/buffer zone provision is limited to those instances where a licensee could have, but failed to prevent the proscribed conduct. The provision, thus interpreted, is constitutional.

F.

Finally, we address the plaintiffs' argument that the Ordinance fails to provide the prompt judicial review required of prior restraint schemes by *Freedman v. Maryland*, 380 U.S. 51 (1965). Specifically, the plaintiffs argue that because the Ordinance requires them to proceed to court via a common law writ of certiorari, it fails to protect their right to expeditious judicial review on the merits.

Before reaching that issue, however, we must address Metropolitan Nashville's argument that the plaintiffs have failed to present us with a justiciable controversy. We review issues of Article III justiciability *de novo*. *See NRA v. Magaw*, 132 F.3d 272, 278 (6th Cir.1997).

1.

Metropolitan Nashville argues that the plaintiff businesses and operators have no standing to challenge the licensing procedures because they have all been issued licenses. For support, Metropolitan Nashville cites *DLS*, which held that a business and its owner did not have standing to challenge a licensing procedure under which they had already received licenses. *See DLS*, 107 F.3d at 413.

> If they are to be subject to any future threat of injury from actions by the City, that threat will arise under the materially different procedures for renewals or revocations of licenses. . . . Therefore, they cannot demonstrate that their challenge to the licensing procedures satisfies the three core requirements for standing under Article III.
>
> *Id.*

Metropolitan Nashville misunderstands the plaintiffs' argument. Here, plaintiffs have raised a facial challenge claiming that the Ordinance's procedures for reviewing Board decisions fail to provide for prompt judicial review as required by *Freedman*. The appeal procedures under the Ordinance are essentially identical whether the Board initially refuses to grant a license, or whether the Board suspends or revokes an already-existing license. *See*

§§ 6.54.040(E)(2) (procedure for appealing denial of license); 6.54.150(E)(6) (procedure for appealing suspension or revocation of license). Therefore, this case is distinguishable from the *DLS* scenario, where "[a]ny modification to the licensing scheme would have no effect on the potential threat that [the plaintiffs] face under renewal or revocation proceedings." *See DLS*, 107 F.3d at 414.

It is immaterial that Metropolitan Nashville has not yet sought to suspend or revoke the plaintiffs' licenses. A mere threat to First Amendment interests is a legally cognizable injury. *See Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir.1989). "In the area of freedom of expression, it is well established that one has standing to challenge a statute on the ground that it delegates overly broad licensing discretion to an administrative office . . . whether or not he applied for a license." *Freedman*, 380 U.S. at 56. Arguing that a statute lacks sufficient procedural safeguards is one way to allege overly broad licensing discretion.

> [Plaintiff's] argument is that, because the apparatus operates in a statutory context in which judicial review may be too little and too late, the . . . statute lacks sufficient safeguards for confining the censor's action to judicially determined constitutional limits, and therefore contains the same vice as a statute delegating excessive administrative discretion.

Id. at 57. "By the same token, . . . Plaintiff does not have to wait until his license is revoked to have standing to challenge the allegedly overbroad licensing scheme that would allow its revocation." *See G & V Lounge, Inc. v. Michigan Liquor Control Comm'n*, 23 F.3d 1071, 1075 (6th Cir.1994). Therefore, the plaintiff businesses and operators

have standing to raise their facial challenge to the Ordinance.

Additionally, we find this case ripe for review. Ripeness requires that the "injury in fact be certainly impending." *NRA*, 132 F.3d at 280 (citation omitted). The doctrine exists "to ensure that courts decide only existing, substantial controversies, not hypothetical questions or possibilities." *Dixie Fuel Co. v. Comm'r of Soc. Sec.*, 171 F.3d 1052, 1057 (6th Cir.1999) (internal quotation marks and citations omitted). In determining whether the entertainers' claim is ripe, we consider "whether the issues are fit for judicial decision as well as the hardship to the challenging party resulting from potential delay in obtaining judicial decision." *Id.* at 1058.

Metropolitan Nashville claims that the entertainers are not under any threat with regard to the Ordinance because the entertainers have not yet sought a permit. We disagree. The entertainers join with the other plaintiffs in challenging the Ordinance's judicial review provisions. Because this is a purely legal issue, and because, as already demonstrated, the plaintiffs have standing to raise it, the issue is fit for a judicial decision. Moreover, as Metropolitan Nashville acknowledges in its brief, "[p]arties not yet affected by the actual enforcement of the statute are allowed to challenge actions under the First Amendment in order to ensure that an overbroad statute does not act to 'chill the exercise of free speech and expression,' a constitutionally protected right." Gov. Br. at 12 (citing *Dambrot v. Central Mich. Univ.*, 55 F.3d 1177, 1182 (6th Cir.1995)). The plaintiffs facially challenge the Ordinance's overbreadth, alleging that the lack of prompt judicial review vests too much discretion in the Board. By

Metropolitan Nashville's own admission, then, their claim is ripe for review.

2.

We now turn to the merits of the plaintiffs' claim that the Ordinance constitutes a system of prior restraint, and that it fails to guarantee the requisite prompt judicial review of license/permit denials and revocations. We review a district court's order dissolving a preliminary injunction for an abuse of discretion, reviewing *de novo* where the dissolution is based upon a legal conclusion. *See Reese v. City of Columbus*, 71 F.3d 619, 622 (6th Cir.1995). "A district court abuses its discretion when it relies on clearly erroneous findings of fact, or when it improperly applies the law or uses an erroneous legal standard." *Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1378 (6th Cir.1995). "A factual or legal error alone may be sufficient to establish that the court abused its discretion in making its final determination." *Id.* (internal punctuation and citations omitted).

A district court must consider four factors when determining whether to grant or deny a preliminary injunction: (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff may suffer irreparable harm absent the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of an injunction upon the public interest. *See Dixie Fuel Co.*, 171 F.3d at 1059-60. In First Amendment cases, the first factor will often be determinative. *See Connection Distrib. Co. v. Reno*, 154 F.3d 281, 288 (6th Cir.1998). This is because the Supreme Court has recognized that even minimal infringement upon First

Amendment values constitutes irreparable injury. *See Newsom*, 888 F.2d at 378. Additionally, if the plaintiff shows a substantial likelihood that the challenged law is unconstitutional, no substantial harm to others can be said to inhere in its enjoinment. *See Connection Distrib.*, 154 F.3d at 288. Moreover, "it is always in the public interest to prevent violation of a party's constitutional rights." *G & V Lounge, Inc.*, 23 F.3d at 1079. Accordingly, we shall focus our attention on the first factor.

A "prior restraint" exists when the exercise of a First Amendment right depends on the prior approval of public officials. *See Nightclubs, Inc.*, 202 F.3d at 889 (citing *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975)). "Any system of prior restraints comes to this Court bearing a heavy presumption against its constitutional validity." *Freedman*, 380 U.S. at 57. In *Freedman*, a unanimous Supreme Court found that three procedural safeguards were required for a prior restraint scheme to avoid constitutional infirmity. *See Id.* at 58-59. First, the decision whether or not to grant a license must be made within a specified, brief period, and the status quo must be preserved pending a final judicial determination on the merits. *See Id.* at 59. Second, the licensing scheme "must also assure a prompt judicial decision, to minimize the deterrent effect of an interim and possibly erroneous denial of a license." *Id.* Third, the licensing scheme must place the burden of instituting judicial proceedings and proving that expression is unprotected on the licensor rather than the exhibitor. *See Id.* at 58. Licensing schemes in a city ordinance regulating sexually oriented businesses constitute a prior restraint that must incorporate at least the first two *Freedman* procedural safeguards. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 229-30 (1990)

(plurality opinion of O'Connor, J.);[5] *see also Nightclubs, Inc.*, 202 F.3d at 890; *East Brooks Books, Inc.*, 48 F.3d at 224.

Sections 6.54.040(E) and 6.54.070(D) of the Ordinance provide the procedures for obtaining relief from the denial of a license or permit:

> Any denial of an application for a license may be immediately appealed to the circuit or chancery courts of Davidson County. The metropolitan department of law may institute proceedings for a declaratory judgment. If the applicant chooses to appeal by filing a writ of certiorari, then the metropolitan government shall file the record of all proceedings with the court within ten days from the date the metropolitan government was served with a petition for a writ of certiorari.[6]

> Tennessee state law requires that if an appeal is taken from an administrative decision barring an applicant from engaging in First Amendment activities, "the court shall hear the matter and issue its decision within forty (40) days of the court

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[5] Three justices held only the first two *Freedman* safeguards applied, three justices would have applied all three, *see Id.* at 238-39 (Brennan, J., concurring in the judgment), and three more would not have applied any. *See Id.* at 244 (White, J., concurring in part and dissenting in part); *see also Id.* at 253 (Scalia, J., concurring in part and dissenting in part). Accordingly, at a minimum, we must apply the first two *Freedman* safeguards.

[6] Although this language could be read as authorizing two avenues for appeal, a direct appeal by which Metropolitan Nashville does not have to file the record of all proceedings within ten days, and an appeal via a common law writ of certiorari whereby Metropolitan Nashville must timely file the record, Metropolitan Nashville insisted at oral argument that the provision authorizes only an appeal via the common law writ.

granting the writ of certiorari." T.C.A. § 27-9-111 (Michie 1999). The plaintiffs argue that these provisions fail to comply with the first two *Freedman* safeguards. We agree.

"Whether the common law writ of certiorari will issue is a matter of discretion. It is not issued as a matter of right." *Boyce v. Williams*, 389 S.W.2d 272, 277 (Tenn. 1965). Thus, the Ordinance, in requiring that aggrieved applicants proceed to court via a discretionary route, fails to guarantee a "final judicial adjudication on the merits," as required under *Freedman's* first safeguard. Metropolitan Nashville points to *State v. Johnson*, 569 S.W.2d 808 (Tenn.1978), for support that Tennessee courts will not deny a writ in this context. *See Id.* at 815 (finding that writs should issue where denial of the writ is "tantamount to the denial to either party of a day in court"). Even that case, however, reiterates the rule that "certiorari is a discretionary writ." *Id.* at 814 (noting that whether a lack of appellate remedy exists is "critical" for determining whether to grant a writ). Because Metropolitan Nashville has failed to demonstrate that the denial of a writ would be tantamount to the denial to an applicant of a day in court, we cannot agree that this discretionary writ guarantees an aggrieved applicant that a court will hear and decide the merits of her claim, as required by *Freedman*.[7]

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[7] Theoretically, for instance, an aggrieved applicant could file a § 1983 suit against the Board and its members. Although such a suit would not provide complete relief, as the applicant would be foreclosed from "speaking" until a final adjudication, it is a far cry from the facts of *Johnson*, where the court found the erroneous suppression of evidence would force Metropolitan Nashville to drop its criminal charges against the defendant and that double jeopardy would prohibit the city from filing new charges. In that context, Metropolitan

(Continued on following page)

Metropolitan Nashville also argues that the plaintiffs' concern that the courts may not promptly determine whether or not to grant the writ petition is unfounded. For support, Metropolitan Nashville cites to an affidavit presented to the district court from the Clerk and Master for the Chancery Courts of Davidson County, stating that "[g]enerally, our office processes all petitions for a writ of certiorari . . . within two days of the filing of the petition." This anecdotal affidavit, however, is insufficient to establish that aggrieved applicants are *guaranteed* prompt judicial review.

First, the affidavit does not address Davidson County's circuit courts, where the Ordinance also directs that an aggrieved applicant's appeal may lie. Therefore, the record is completely absent of any evidence as to the turn-around time of petitions filed with the circuit court, and it was clearly erroneous of the district court to find otherwise. More importantly, the affidavit only avers the chancery court's *general* practice. The Constitution requires more. "[A]ny limiting construction must 'be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice.'" *Nightclubs, Inc.*, 202 F.3d at 891 n. 6 (citing *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 700 (1988)). A well-established practice is one where "a well-understood and *uniformly applied* practice has developed that has virtually the force of a judicial construction." *City of Lakewood*, 486 U.S. at 770 n. 11 (emphasis added). In the absence of such strong evidence, "[w]e can neither

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Nashville would have literally had no legal recourse if the court had denied its petition for a writ of certiorari, and it is therefore at least potentially distinguishable from this case.

presume that municipal officials will act in good faith and respect a speaker's First Amendment rights, nor read a requirement into an ordinance that is not fairly and evidently present." *Nightclubs, Inc.*, 202 F.3d at 891 n. 6. A "uniformly applied" practice is simply not the same as a "generally" applied one. Because the chancery court clerk's affidavit does not present such strong evidence, and because the record contains no evidence as to the circuit court's practices, we cannot agree with the district court that the Constitution's requirements have been satisfied by this proof.

Second, the affidavit purports only to describe the average length of time it takes to "process" all petitions for a writ of certiorari. It says nothing about whether the court is obligated to grant the writ at all, and therefore, it fails to address the biggest problem with the Ordinance's judicial review provision. Without some affirmative evidence showing that every writ of certiorari will be granted, we find that the Ordinance's judicial review provisions do not guarantee prompt judicial review, as required by the First Amendment.[8] The lack of a judicial review provision renders the entire statute facially unconstitutional, and therefore, severing the ineffectual provision will not save

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[8] The Ordinance does preserve the status quo by allowing existing businesses to continue to operate until an adjudication on the merits and by issuing a temporary license to new businesses if the court fails to rule within forty days of the filing of an appeal. *See* M.C.L. 6.54.040(E)(3) and (4); *see also* M.C.L. 6.54.070(D)(3) and (4) (applying same rules to permit applicants). Merely preserving the status quo, however, is not sufficient to satisfy *Freedman*. The decision whether or not to grant a license must still be made within a specified, brief period, and the licensing scheme "must *assure* a prompt judicial decision." *See Freedman*, 380 U.S. at 59 (emphasis added). The Ordinance's discretionary appeals procedure fails to satisfy these separate requirements.

the statute. Under these circumstances, we cannot give effect to the severability clause, but must enjoin enforcement of the entire Ordinance.

III.

In the first of two final matters, the plaintiffs ask us to vacate the magistrate's grant of a protective order to Metropolitan Nashville with regard to the plaintiffs' discovery requests dealing with Metropolitan Nashville's basis for believing sexually oriented businesses cause "secondary effects." The plaintiffs concede, however, that although they moved for the district court to review the magistrate's decision, the court did not rule on the motion before issuing its decisions enjoining the Ordinance's enforcement. We decline to rule on the propriety of the magistrate's order before the district court has a chance to review it.

Finally, we briefly address Metropolitan Nashville's argument that the district court erred in finding that its appeal to this Court divested the district court of jurisdiction to hear its Rule 60(b) motion to dissolve the permanent injunction. The filing of an appeal with this Court generally divests a district court of jurisdiction over the case. *See First Nat'l Bank of Salem, Ohio v. Hirsch*, 535 F.2d 343, 345 (6th Cir.1976). In the district court's discretion, however, it may enter an order stating that it is disposed to grant a Rule 60(b) motion, which would allow the requesting party to move this Court to remand the case, thereby once again vesting jurisdiction in the district court. *See id.* at 346. Nonetheless, Metropolitan Nashville concedes that the district court is under no obligation to issue such an order, and in fact characterized this appeal

as a "procedural misstep" at oral argument. We agree. The district court did not abuse its discretion in refusing to rule on Metropolitan Nashville's Rule 60(b) motion following Metropolitan Nashville's appeal to this Court.

IV.

For the foregoing reasons, we AFFIRM the district court's finding that the definition of "sexually oriented" is unconstitutional under the First Amendment. We further AFFIRM the district court's finding that the definitions of "sexually oriented business/establishment" and "sexually oriented theater," and the no touch/buffer zone provision satisfy the First Amendment. Finally, we AFFIRM the district court's refusal to hear Metropolitan Nashville's Rule 60(b) motion. We REVERSE, however, the district court's finding that the civil disabilities provision, the disclosure provision, and the fee amounts are unconstitutional. We further REVERSE the district court's finding that the Ordinance's judicial review procedures satisfy the First Amendment. Upon remand, the district court should maintain the injunction until Metropolitan Nashville satisfies it that the constitutional problems with the Ordinance's definition of "sexually oriented" and its judicial review procedures have been corrected.

HARRY W. WELLFORD, Circuit Judge, concurring in part and dissenting in part.

CONCURRING IN PART, DISSENTING IN PART

I concur in the Chief Judge's opinion in this difficult case in most respects. I write separately to set out my views with respect to part II.F dealing with standing and prompt judicial review. The majority found that prompt

judicial review is "required by *Freedman* [*v. Maryland*, 380 U.S. 51 (1965)]." *Supra* at 26. *Freedman*, however, involves a very different set of circumstances from the present controversy, because that case presented a First Amendment challenge to the "Maryland motion picture censorship statute."[1] *Id.* at 52. The Supreme Court pointed out that under the Maryland law in question "there is *no* statutory provision for judicial participation in the procedure which bars a film, *nor even assurance of prompt judicial review.*" *Id.* at 55 (emphasis added). Furthermore, the Court recognized the unique nature of the film industry, stating that "a censorship system for motion pictures presents *peculiar dangers* to constitutionally protected speech." *Id.* at 57 (emphasis added). Our present case, of course, does not involve freedom of speech in a film, but freedom of expression in a sexually-oriented place of business.

I. *STANDING*

I would not hold *Freedman* controlling on the issue of standing because of the circumstances in that case are entirely different from those in the instant controversy. This court has interpreted *Freedman* broadly to apply to similar types of cases brought by adult "entertainment" operators and performers, such as plaintiffs. For example, *G & V Lounge, Inc. v. Michigan Liquor Control Commission*, 23 F.3d 1071 (6th Cir.1994), cited by the majority, involved "threatened revocation" of a liquor license if topless dancing were to occur at an Inkster, Michigan bar

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[1] Indeed, in *Freedman*, the state conceded "that the picture [at issue] does not violate the statutory standards." *Freedman*, 380 U.S. at 52.

and nightclub. *G & V Lounge, Inc.*, 23 F.3d at 1073. With that scenario and the evidence of threatened and imminent action by the state of license revocation, this court held that plaintiff operator had standing to bring a First Amendment claim, citing Supreme Court authority, including *Freedman*. Standing would be present in such a situation even if no revocation had taken place.

In the instant case, however, the plaintiffs make no allegation of threatened revocation of their licenses (or actual censorship). The majority recognizes Metropolitan Nashville's argument "that the plaintiff businesses and operators have no standing to challenge the license procedures because they have all been issued licenses." What it fails to recognize, however, is that no plaintiff has been threatened with revocation under the ordinance. Metropolitan Nashville concedes that "parties not yet affected by actual enforcement of the statute are allowed to challenge actions under the First Amendment." It is doubtful, however, particularly in light of *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403 (6th Cir.1997), that the plaintiffs, not operating under any threat of revocation, would have standing to challenge the constitutionality of procedures involved in the Ordinance at issue.

I would hold that plaintiffs have standing to challenge the substantive criteria for the issuance of licenses or permits, but do not have standing to challenge "the licensing scheme." *See DLS*, 107 F.3d at 413. In *DLS*, we reasoned that the plaintiffs lacked such standing because they "already have succeeded in obtaining a license under [the applicable ordinance]. If they are to be subject to any future threat of injury from actions by the City, that threat will arise under the materially different procedures for renewals or revocations of licenses under [different

provisions]." *Id.* I am not persuaded that, in the instant case, the procedures involved for revocation are not different from the procedures required for applying for initial licenses.

I find neither *Newsom v. Norris*, 888 F.2d 371 (6th Cir.1989), nor *Dambrot v. Central Michigan University*, 55 F.3d 1177 (6th cir.1995), both cited in the majority opinion, to be particularly helpful to plaintiffs on the issue of standing. *Newsom* involved a prison setting and alleged retaliation against inmate advisors. *Dambrot* involved a university's alleged discriminatory harassment policy in a discharge situation addressing the issue of freedom of speech. Neither case involved the type of expression here involved, held repeatedly to be subject to reasonable, narrowly drawn state regulation.

FW/PBS is a case much more analogous to this case than *Freedman*. The city ordinance in *FW/PBS* purported to regulate businesses similar to those operated by plaintiffs in this case. Plaintiffs were permitted to raise a facial challenge to the ordinance because special inspections and certificates of occupancy were demanded of sexually-oriented businesses. Such provisions are absent from the Metropolitan Nashville ordinance.

II. *PROMPT JUDICIAL REVIEW*

The Court in *Freedman* emphasized that the censorship of a film "puts an initial burden on the exhibition."[2] *Id.* Again, this is not the situation in the instant controversy.

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[2] "Films differ from other forms of expression." *Freedman*, 380 U.S. at 61.

In the film censorship area, *Freedman* mandated a procedure "which must ... assure a prompt final judicial decision." *Id.* at 59. The Supreme Court emphasized the need for prompt judicial review of film censorship laws, recognizing that in the Maryland scheme there was "*no assurance* of prompt judicial determination." *Id.* at 60 (emphasis added). Apparently, the scheme contained no provision for judicial review of film censorship, an entirely different circumstance from the instant case. Whether or not there is an adequate provision for prompt judicial review in these circumstances is a legal question and forms a basis for injunctive relief if it is wanting. The legality of prior restraints of freedom of expression in adult sexually-oriented businesses, while not illegal per se, requires the special attention of this court. *FW/PBS*, 493 U.S. at 225-26. To be constitutional, a prior restraint must place reasonable and prompt time constraints on the administrative process of issuing business licenses and permits and must provide "expeditious judicial review" of administrative decisions. *Id.* at 227 (citing *Freedman*, 380 U.S. at 58-60).[3]

The Court in *FW/PBS* mandated that any such licensing scheme provide for the "*possibility* of prompt judicial review in the event that the license is erroneously denied." *Id.* at 228 (emphasis added). The Court also relied on the specific circumstances of that case in holding that, unlike *Freedman*, the city did not have the burden of proof once in court. *Id.* at 230. The question of prompt judicial review of the license permit action was whether there were

[3] *FW/PBS* makes it clear that the "licensing scheme" in this type of case "does not present the grave dangers of a censorship system" that was present in *Freedman*. *FW/PBS*, 493 U.S. at 228.

"adequate bulwarks."[4] *Id.* Moreover, the Court in *FW/PBS* raised on its own volition the question of standing of certain plaintiffs who challenged the civil disability provision of the ordinance. *Id.* at 234-35. The Court held that there was no standing to challenge revocation on the basis of past criminal conviction or conduct where no petitioner actually demonstrated revocation of a license under the civil disability provision. *Id.* at 235.

I believe that the Ordinance at issue does meet the standards set out in *FW/PBS*, because it provides for much more than a "possibility" of prompt judicial review. Sections 6.54.04(E) and 6 .54.070(D) of the ordinance specify certain procedures for obtaining relief from denial of a license or permit. First, a denial "*may be* immediately appealed to the circuit or chancery courts of Davidson County." (Emphasis added.) There is no requirement in the ordinance as to the form of relief that may be sought by the unsuccessful applicant.[5] There is no reason why an applicant may not pursue a declaratory judgment action or seek injunctive relief if a constitutional issue is claimed to be involved in either state or federal court because of an asserted invalid or improper denial. If the applicant, under the above sections of the ordinance, does choose to appeal by seeking a writ of certiorari, he or she is provided with a prompt record and an opportunity to challenge the procedures involved in a denial. Contrary to the Chief Judge,

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[4] The authority cited for this proposition was *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1962), a book censorship case. The Rhode Island law at issue in *Sullivan* provided for no judicial review.

[5] Despite any purported argument made to the effect that appeal by writ of certiorari is the only statutory avenue of relief upon denial of an application, the ordinance speaks for itself in this regard.

I believe that *State v. Johnson*, 569 S.W.2d 808 (Tenn.1978), does support the proposition that Tennessee court would entertain a petition for a writ of certiorari from denial of an application even if the action taken were discretionary in nature.

I respectfully disagree with the statement by the majority in footnote 7, because temporary injunctive relief or mandamus could issue in a § 1983 suit against Metropolitan Nashville if an application were denied based on, for example, racial, sexual, or other illegal discriminatory animus, thus allowing the plaintiff to "speak" pending final adjudication. Furthermore, under the majority holding of *FW/PBS*, I believe that a rejected applicant has the opportunity for an adequate and expeditious judicial review based upon available remedies, as supported also by the affidavit of the Clerk of the Davidson County Chancery Court. There is a sufficient protection in such an event of denial of a meritorious application under the ordinance and the proof for prompt judicial review; in short, there is an "adequate bulwark" by judicial review available. The majority opinion states in footnote 8 that "[t]he ordinance does preserve the status quo by allowing existing businesses to continue to operate *until an adjudication on the merits* and by issuing a temporary license to new businesses if the court fails to rule within forty days of the filing of an appeal." (Emphasis added.) I agree with this interpretation of the effect of the ordinance, and this also presents an adequate and reasonable bulwark constitutionally, in my view.

In sum, I respectfully disagree that there is, in this ordinance, "lack of judicial review provision." There is not only such a provision but there is also a reasonable stay provision to protect a plaintiff pending judicial review. We

are not dealing in this case with censorship, or attempted censorship, of speech, books, or films (as in *Freedman, supra*).

Finally, even if the judicial review provisions were inadequate, I would conclude that the severance provision in the ordinance is effective, and I would not agree to void enforcement of the entire ordinance because of perceived insufficient means of prompt judicial review.[6]

Accordingly, I respectfully dissent from parts of the majority decision for the reasons indicated.

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[6] A case cited as giving support to the majority view is a four-to-three decision of the court, *Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), which permitted a facial challenge to a municipal ordinance regulating newspaper racks on city streets. The later case of *FW/PBS* states the principle applicable in this situation: "Limitation on the time within which the licensor must issue the license as well as the availability of prompt judicial review satisfy the 'principle that the freedoms of expression must be ringed about with adequate bulwarks.'" *FW/PBS*, 493 U.S. at 230.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 99-5071; 00-5284/5288/5881

DEJA VU OF NASHVILLE, INC., a Tennessee corporation; MICHAEL RUCKER, individually; MICHAEL BUTLER, individually; MERONEY ENTERTAINMENT, INC., d/b/a KEN'S GOLD CLUB, a Tennessee corporation; THE PLEASURE PALACE, INC., a Tennessee corporation; DAWN PIERCE, individually; ELIZABETH MARTZ, individually; JERRY C. PENDERGRASS, individually; THE 822 CORPORATION; THE 421 CORPORATION,

Plaintiffs-Appellants (99-5071),
Plaintiffs-Appellees (00-5881),
Plaintiffs-Appellees/Cross-Appellants (00-5284/5288),

v.

THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; EMMETT TURNER, Chief of Police of the Metropolitan Police Department,

Defendants-Appellees (99-5071),
Defendants-Appellants (00-5881),
Defendants-Appellants/Cross-Appellees (00-5284/5288).

Before: MARTIN, Chief Judge; WELLFORD and SUHRHEINRICH, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court for the Middle District of Tennessee at Nashville.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is AFFIRMED IN PART and REVERSED IN PART, and the case is REMANDED in accordance with the opinion of the court.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green 12-6-01
Leonard Green, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

DEJA VU OF NASHVILLE, et al.	)	NO. 3:97-1066
v.	)	JUDGE CAMPBELL
METROPOLITAN GOVERNMENT of NASHVILLE/DAVIDSON COUNTY, et al.	)	CONSOLIDATED CASES

ORDER

(Entered Oct. 9, 2003)

Pending before the Court is Defendants' Motion to Alter or Amend Final Order on Attorneys' Fees (Docket No. 286). Defendants ask the Court to amend the Order (Docket No. 284) to reflect the fact that Defendants filed a timely objection to the Magistrate Judge's Report and Recommendation.

Defendants' Motion is GRANTED. Defendants filed a timely Objection to the Report and Recommendation (Docket No. 285), on the same day this Court entered its Order (Docket No. 284). Having reviewed Defendants' Objection, the Court finds that nothing therein changes the result of its prior Order. That Order (Docket No. 284) is amended, however, to reflect that Defendants did file a timely Objection thereto.

IT IS SO ORDERED.

/s/ Todd Campbell
TODD J. CAMPBELL,
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
AT NASHVILLE

DEJA VU OF NASHVILLE, et al. v. METROPOLITAN GOVERNMENT of NASHVILLE/DAVIDSON COUNTY, et al.	NO. 3:97-1066 JUDGE CAMPBELL CONSOLIDATED CASES

ORDER

(Entered Dec. 6, 2002)

Pending before the Court are a Report and Recommendation of the Magistrate Judge (Docket No. 265), dated October 1, 2002; Plaintiffs' Objections thereto (Docket No. 267); and Defendants' Objection thereto (Docket No. 273). The Court has reviewed the findings of the Magistrate Judge, the Objections and the file.

Plaintiffs' and Defendants' Objections are OVERRULED, and the Report and Recommendation (Docket No. 265) is APPROVED, adjusted for the mathematical and typographical errors corrected by Plaintiffs regarding Plaintiffs' First Motion for Attorneys' Fees (*see* Docket No. 268, pp. 3-4).

The Report and Recommendation does not include a final total for the amount owed. The parties shall attempt to agree on that figure, based upon the allowances and disallowances of the Report and Recommendation and shall file written notice of that amount with the Court. If the parties are unable to agree on the total amount, they should file motions to be determined in the first instance by the Magistrate Judge.

IT IS SO ORDERED.

/s/ Todd Campbell
TODD J. CAMPBELL,
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC.; MICHAEL RUCKER; MICHAEL BUTLER; MERONEY ENTERTAINMENT, INC.; THE PLEASURE PALACE, INC.; CAROUSEL AMUSEMENT CENTER, INC.; DAWN PIERCE; and ELIZABETH MARTZ	)	
v.	)	No. 3-97-1066
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, and EMMITT TURNER, Chief of Police and JERRY C. PENDERGRASS; 822 CORPORATION; and 421 CORPORATION	)	Consolidated with 3-97-1176
v.	)	
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE	)	

TO: Honorable Todd J. Campbell,. United States District Judge

REPORT AND RECOMMENDATION

I. BACKGROUND

(Entered Oct. 1, 2002)

On August 19, 1997, the Council of the Metropolitan Government of Nashville and Davidson County enacted Chapter 6.54 of the Metropolitan Code, Bill No. 097-796. This chapter, and subsequently enacted amendments to it, required "sexually oriented" businesses to obtain a license to operate and entertainers who perform in such establishments to obtain a permit. The August 19, 1997, ordinance established an effective date of November 1, 1997, and allowed existing businesses 120 days to apply for a license and entertainers 45 days to apply for a permit. Sections .0130(F) and .060(B) of Chapters 6.54. *See* Exhibit C to Docket Entry No. 11.

The plaintiffs in this action are adult-oriented establishments, including adult cabarets, adult bookstores, and adult video stores in Metropolitan Nashville and Davidson County, Tennessee, owners and operators of such establishments, and individuals dancers who perform at such establishments. The plaintiffs in the first filed case ("the Deja Vu plaintiffs") filed this action under 42 U.S.C. § 1983, on October 17, 1997, against the Metropolitan Government of Nashville and Davidson County and Emmitt Turner in his official capacity as Chief of Police of the Metropolitan Police Department, seeking a preliminary injunction, permanent injunction, and declaratory judgment to determine the constitutionality of Chapter 6.54. On November 10, 1997, the plaintiffs in the second listed action (the "Pendergrass plaintiffs") moved to intervene as plaintiffs in this case, and commenced their own lawsuit, alleging similar harms, and seeking a preliminary

injunction. By order entered December 8, 1997 (Docket Entry No. 23), the two actions were consolidated, mooting the motion of the Pendergrass plaintiffs to intervene, and enjoined the defendants from enforcing any of the provisions of Chapter 6.54 because the ordinance failed to provide for prompt judicial review of decisions by the Sexually Oriented Businesses Licensing Board. The Metropolitan Council subsequently amended the ordinance to correct the defects upon which the preliminary injunction was based, and, by order entered December 3, 1998 (Docket Entry No. 76), the injunction was dissolved. The dissolution of the injunction was appealed to the Court of Appeals for the Sixth Circuit (Docket Entry No. 94).

On December 17, 1998, the plaintiffs filed their second motions for a preliminary injunction (Docket Entry No. 80 and 82), asserting claims previously preserved and not raised in the first motions. In response (Docket Entry No. 104), the defendants stated that certain sections of the ordinance would be severed, that other sections would be enforced "subject to a limiting construction," and that, accordingly, enforcement of the remaining constitutional provisions should be permitted. On March 23, 1999, the defendants filed a notice that 92 amendments to the ordinance had been enacted (Exhibit E to Docket Entry No. 134), and argued that the constitutional infirmities asserted by the plaintiffs were moot in light of the amendments (Docket Entry No. 136).

The Court granted the plaintiffs leave to file a motion for interim attorneys fees based on their status as a prevailing party on their first motion for preliminary injunction, which served as a catalyst for subsequent amendments to the ordinance, Docket Entry No. 152, and

the plaintiff filed a motion seeking an award of attorney fees (Docket Entry No. 158), in the amount of $258,536.75, and costs and expenses of $56,726.79, for the Deja Vu plaintiffs and attorneys fees in the amount of $38,231.25, and costs and expenses of $4,342.50 for the Pendergrass plaintiffs, for a total request of $357,837.29.

By order entered October 4, 1999 (Docket Entry No. 189), the Court granted the plaintiffs' second motions for preliminary injunction, finding that the definitions of "sexually oriented" and "sexually oriented theater," the civil disabilities provision, the disclosure provision, and the fee amounts were unconstitutional. Because the Court found that the offending provisions could not be severed from the ordinance as a whole, the Court enjoined the defendants from enforcing Chapter 6.54 in its entirety.

By order entered December 23, 1999 (Docket Entry No. 199), the preliminary injunction was made permanent and the defendants were permanently enjoined from enforcing Chapter 6.54. Accordingly, the Court ordered that "the applications for interim attorneys' fees shall be deemed final applications for fees in favor of the prevailing parties as of conclusion of this litigation by entry of this order." Pursuant to that order, the plaintiffs filed their second motion for attorney fees (Docket Entry No. 201).

The defendants appealed the December 23, 1999, order (Docket Entry No. 208), and the plaintiffs filed a cross-appeal (Docket Entry No. 212) of the portion of the December 23, 1999, decision, finding constitutional the definition of "sexually oriented business/establishment" and the no touch/buffer zone provision, along with the order of the Magistrate Judge (Docket Entry No. 56), granting in significant part the defendants' motion for a

protective order and denying discovery requested by the plaintiffs.

By order entered May 24, 2000 (Docket Entry No. 228), the Court denied the defendants' motion to vacate or dissolve the injunction under Rule 60(b) of the Federal Rules of Civil Procedure because of amendments to the ordinance. The defendants filed a notice of appeal from that order (Docket Entry No. 233).

By mandate issued December 6, 2001, the Court of Appeals affirmed in part and reversed in part. Specifically, the Court of Appeals affirmed the District Court's finding that the definitions of "sexually oriented business establishment" and "sexually oriented theater" were not unconstitutionally overbroad, and that the no touch/buffer zone provision was constitutional, but the Court found that the unconstitutionally overbroad definition of "sexually oriented" could easily be severed from the ordinance. The Court also found that the civil disabilities provision, the disclosure provision, and the fee amounts were constitutional, reversing the District Court's finding that such provisions were unconstitutional. *Deja Vu v. Metropolitan Government*, 274 F.3d 377 (6th Cir. 2001). The Court reversed the District Court's finding that the judicial review procedures were constitutional, and remanded with instructions that the injunction against enforcement of the ordinance should remain until the constitutional problems with the definition of "sexually oriented" and the judicial review procedures are corrected. Finally, the Court of Appeals declined to rule on the discovery issue raised by the plaintiffs since the District Court had not reviewed the order of the Magistrate Judge, and agreed with the defendants' characterization of their appeal of the District Court's denial of

the Rule 60(b) motion as a "procedural misstep." *Id.* at 402.

On January 7, 2002, the plaintiffs filed their third motion for attorney fees, requesting an additional $264,504.37, in fees and expenses (Docket Entry No. 240).

Rehearing and rehearing en banc were denied by the Court of Appeals on February 5, 2002, and certiorari was denied by the United States Supreme Court on May 13, 2002.[1]

II. DISCUSSION

The Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, provides that in civil rights actions "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs." The United States Supreme Court has instructed the courts to calculate attorney fees under the "lodestar" method by which the number of hours reasonably expended by the attorney are multiplied by the attorney's reasonable hourly rate. *Blanchard v. Bergeron*, 489 U.S. 67, 94, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989); *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983). There is a strong presumption that the figure so calculated represents a reasonable fee, *Pennsylvania v. Delaware Valley Citizen's Council for Clean Air*, 478 U.S. 546, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986), and, although the defendants may dispute and/or question the evidence put

[1] On June 12, 2002, the plaintiffs filed their fourth motion for attorney fees (Docket Entry No. 256), requesting an additional award of fees in the amount of $48,980.03. That motion will be addressed in a separate Report and Recommendation.

forth by the plaintiffs in support of the hours worked and rates claimed, "[a] request for attorney's fees should not result in a second Major litigation." *Hensley*, 461 U.S. at 436. Moreover, although an award of attorney fees under section 1988 is discretionary,[2] "in the absence of special circumstances a district court not merely 'may' award but *must* award fees to the prevailing plaintiff. . . ." *Morscott, Inc. v. City of Cleveland*, 936 F.2d 271, 272 (6th Cir. 1991) (quoting *Independent Fed'n of Flight Attendants v. Zipes*, 491 U.S. 754, 761, 109 S.Ct. 2732, 105 L.Ed.2d 639 (1989) (citing *Newman v. Piggie Park Enter.*, 390 U.S. 400, 402, 88 S.Ct. 964, 19 L.Ed.2d 1263 (1968)) (emphasis in original).

A. Hourly Rates

To calculate the amount of reasonable attorneys fees to which a prevailing party is entitled, the Court must first determine the lodestar amount, which is based on the number of hours reasonably expended on the litigation, multiplied by the reasonable hourly rate of the plaintiffs' attorneys. *Hensley*, 461 U.S. at 434. "Reasonable fees under § 1988 are to be calculated according to the prevailing market rates in the relevant community," *Blum v. Stenson*, 465 U.S. 886, 895, 104 S.Ct. 1541, 79 L.Ed.2d 891

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[2] *See Hensley*, 461 U.S. at 437. *See also Louisville Black Police Officers Org., Inc. v. City of Louisville*, 700 F.2d 268, 274 (6th Cir. 1983) ("the district curt judge who presided over a case is in the best position to evaluate the reasonableness of fee requests, both in terms of the number of hours spent and reasonable hourly rate of compensation"); *Blanchard*, 489 U.S. at 96 ("It is central to the awarding of attorney's fees under § 1988 that the district court judge, in his or her good judgment, make the assessment of what is a reasonable fee under the circumstances of the case").

(1984), and should not exceed what is necessary to encourage lawyers within the relevant community to undertake legal representation. *Coulter v. State of Tennessee,* 805 F.2d 146, 149 (6th Cir. 1986), *cert. denied,* 482 U.S. 914 (1987); *Blum* 465 U.S. at 897. The fee-shifting statutes are designed to provide reasonable compensation, to the end that injured parties will be able to obtain adequate legal representation when there has been a violation of specific, federal laws, *Delaware Valley,* 478 U.S. at 565, but are not necessarily the equivalent of the rates charged well-to-do-clients. *Coulter,* 805 F.2d at 149. *But see Hensley,* 461 U.S. at 435 (the successful civil rights plaintiff is entitled to a fully compensatory feel comparable to compensation by a fee-paying client). Reasonable fees under section 1988 should be calculated according to the market rates in the relevant community. *See Presley v. Haeger,* 977 F.2d 295, 299 (7th Cir. 1992) ("Fee litigation under § 1988 depends on what the market rate is rather than what litigants and judges think it ought to be").

Five attorneys of record participated in this consolidated action on behalf of the plaintiffs, Bradley J. Shafer, Michael Pleasants, Andrew Wilkins, H. Louis Sirkin, and John Herbison. The work of other attorneys in the law offices have also been included in the plaintiffs' request for fees, and the defendants have not objected to their fees simply because they are not attorneys of record or because the plaintiffs have not presented any information about them. Therefore, no reduction is made for the fees of these lawyers.[3]

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[3] Specifically, Scott M. Goldstein (SMG), charging $125.00 per hour; Allan S. Rubin (ASR) charging $150.00 per hour; and Amy Burgess (AIB), charging $125.00 per hour.

It should be noted that the plaintiffs have not listed all of the hours that they worked.[4] They have also not sought an upward adjustment. Finally, Mr. Herbison is on a monthly retainer and, although he was local counsel for the Pendergrass plaintiffs and performed accordingly, he has not requested attorney fees for his services. *See* Docket Entry No. 160.[5]

In their first two motions for attorney fees, Mr. Shafer and Mr. Pleasants, attorneys for the Deja Vu plaintiffs, attest in their affidavits (Docket Entry Nos. 203 and 205), that their hourly rate is $175.00, and that Mr. Wilkins' hourly rate is $125.00. Mr. Sirkin; counsel for the Pendergrass plaintiffs, attests that his hourly rate is $225.00, but his time sheet indicates that his hourly rate is $200.00 (Docket Entry No. 205). *See Hensley,* 461 U.S. at 433 ("[h]ours that are not properly billed to one's *client* are not properly billed to one's *adversary*" (emphasis in original). The defendants do not object to these hourly rates, and the Court finds $175.00 is in accord with the prevailing market rates in Nashville for attorneys with the same background and experience as Mr. Shafer and Mr. Pleasants, and that $125.00 is in accord with the prevailing market rates in Nashville for associates of Mr. Wilkins' experience. The Court accepts the $200.00 hourly rate that Mr. Sirkin actually charged the plaintiffs.

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[4] *See, e.g.,* Docket Entry No. 241, at 8, in which the plaintiffs explained that their requests do not include approximately $80,000.00 in fees and expenses "either not billed initially or excised afterward by use of reasonable discretion and judgment. . . ."

[5] By order entered June 14, 2002 (Docket Entry No. 260), Michael Pleasants was substituted for Mr. Herbison as counsel for the Pendergrass plaintiffs.

In the third motion for attorney fees, Mr. Shafer raises his hourly fee to $200.00 per hour, and Mr. Wilkins raises his hourly fee to $150.00 hour. In addition, Mr. Sirkin began billing at the rate of $225.00 per hour. The defendants raise no objection to these hourly rates, and they should be approved.

B. Prevailing Party

The defendants argue that the plaintiffs did not prevail on specific issues to which the work was related or that the specific notation of work performed was "unspecific" in identifying issues sufficient to determine whether or not the plaintiffs were the prevailing party. Accordingly, the defendants assert that, because the plaintiffs' relief was minimal, only costs and attorneys fees attributable to successful claims should be recovered. Because the plaintiffs' billing records are not specific enough to allow for such a calculation, the defendants contend that the costs and expenses related to unsuccessful motions, briefs, or hearings should be deducted from the award of attorney fees.

However, a plaintiff may be considered a prevailing party even if he does not recover 100% of what he claims, *Hamlin v. Charter Township of Flint,* 165 F.3d 420, 437 (6th Cir. 1999). Issuance of a permanent injunction enjoining enforcement of Chapter 6.54 is clearly a significant victory for the plaintiffs. Enforcement of the ordinance remains enjoined, as a practical matter, since the end of 1997. However, the ultimate mandatory changes in the current ordinance will relate to the definition of "sexually oriented," which, under a reading of the Sixth Circuit decision, will be an easy task of severance, and the judicial

review procedures. All other constitutional challenges asserted by the plaintiffs have now been resolved in the defendants' favor.

Although plaintiffs' counsel should not be compensated for attorney hours spent on distinctly different claims based on different facts and legal theories, claims involving a common core of facts and related legal theories should be not be viewed as, discrete claims in determining an award of attorney fees. *Hensley*, 461 U.S. at 435. Thus, the issue is the significance of the overall relief in relation to the hours reasonably expended on the litigation, not, as the defendants suggest, on the ratio of pages in a brief expended on an issue in comparison to the number of constitutional violations explicitly found by the Court as a basis for enjoining an ordinance.

Under *Henley*, when a plaintiff has succeeded on some claims but not others, the Court must look to whether the unsuccessful claims were related to the successful claims, and whether the level of success attained makes the hours reasonably expended a satisfactory basis for making a fee award. *Id.* at 434. The *Hensley* Court explicitly held that "[l]itigants in good faith may raise alternative legal grounds for a desired outcome and the court's rejection of or failure to reach certain grounds is not a sufficient reason for reducing a fee.[6] The result is what matters." 461 U.S. at 435. Only when the plaintiff "has failed to prevail on a claim that is distinct in all respects from his successful

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[6] *See also Hensley*, 462 U.S. at 448 (Brennan, J., concurring in part and dissenting in part) ("courts should recognize that reasonable counsel in a civil rights case, as in much litigation, must often advance a number of related legal claims in order to give plaintiffs the best possible chance of obtaining significant relief").

claims" should the hours spent on the unsuccessful claim be excluded in considering the amount of a reasonable fee. *Id.* at 440. The Supreme Court specifically rejected "a mathematical approach comparing the total number of issues in the case with those actually prevailed upon," because "[s]uch a rationale provides little aid in determining what is a reasonable fee in light of all the relevant factors," and because it is not "necessarily significant that a prevailing plaintiff did nor receive all the relief requested." *Id.* at 435 n.11.

Likewise, the Court of Appeals for the Sixth Circuit has held that attorney fees should not be reduced based on a "simple ratio of successful claims to claims raised" *Thurman v. Yellow Freight Sys., Inc.*, 90 F.3d 1160, 1169 (6th Cir. 1996) (citing *Phelan v. Bell*, 8 F.3d 369, 374 (6th Cir. 1993). The Sixth Circuit has enunciated the following standard:

> The question is not whether a party prevailed on a particular motion or whether in hindsight the time expenditure was strictly necessary to obtain the relief obtained. Rather, the standard is whether a reasonable attorney would have believed the work to be reasonably expended in pursuit of success at the point in time when the work was performed.

Wooldridge v. Marlene Indus. Corp., 898 F.2d 1169 (6th Cir. 1990).

The most significant consideration is the degree of the plaintiffs' success. *Hensley*, 416 at 434, 436, 440. The Supreme Court has emphasized the necessity for the Court to consider the extent of the success and the amount of the fee award. *Id.* at 438, one hand, the Court instructed

that hours spent on an unsuccessful claim should be excluded if such a claim is distinct in all respects from the successful claim. On the other hand, the Court instructed that a court should not reduce the fees of a plaintiff, who wins substantial relief, if the claims are related if the court does not rule in the plaintiff's favor on each contention. *Id.* at 424.

The plaintiffs argue that the claims in this case are so related that they cannot be severed for the purpose of an attorney fee award. The defendants argue that the claims are, in fact, distinct and can be separated out. The Court agrees with the defendants to a significant extent. Just as the claims in *Hensley*, the grounds asserted by the plaintiffs in this case to hold the ordinance unconstitutional are discrete claims, including lack of judicial review, definitions of "sexually oriented, the civil disabilities provision, the disclosure provision, the fee amounts, and the no touch/buffer zone provision. The plaintiffs have prevailed on the claim of lack of adequate judicial review and the "sexually oriented" definitions. They have not prevailed on their other claims. What *Hensley*, specifically disapproved was the easiest methodology of establishing a ratio of successful and unsuccessful claims to the total of the requested fees. The plaintiffs should not be awarded attorney fees related to claims upon which they did not prevail. However, the Court also agrees with the plaintiffs to the extent that there are circumstances in which it is impossible to separate out with a fine tooth comb the work on one contention advanced from another.

Thus, although hours not reasonably expended will not be compensated, *Hensley*, 461 U.S. at 434, the plaintiffs' attorney is entitled to recover a "fully compensatory

fee" that will not be reduced "simply because the plaintiff failed to prevail on every contention raised in the lawsuit."

C. Catalyst Theory

The defendants argue that, under *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dept. of Health & Human Services*, 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001), the plaintiffs should not be entitled to any attorney fees that resulted in the defendants' voluntary amendments to the ordinance. In *Buckhannon*, the Supreme Court held that it is not sufficient that a lawsuit was a catalyst for legislative action, but that there must be court-ordered relief. There has been court-ordered relief in this case. The defendants are correct that, under *Buckhannon*, attorney fees incurred that were the catalyst[7] for the amendments to the ordinance that were not court ordered cannot be awarded to the plaintiffs. The plaintiffs argue that, although there has been no judicial ruling on issues such as the buffer zone and the civil disability provision of the ordinance including "crimes of moral turpitude," the holding of the Sixth Circuit in finding the current amended version of the ordinance on the buffer zone and civil disability constitutional shows that the Court of Appeals would not have found the original version to have been constitutional. However, it is that circumstance which *Buckhannon* specifically addresses. Therefore, the Court has reviewed the plaintiffs' request for an award of attorney fees and has attempted to exclude work performed that did not result in entry of a preliminary or

[7] The defendant argues that this lawsuit was not, in fact, the Catalyst for the amendments. However, it is not necessary to address this issue because of the inapplicability of the catalyst rule.

permanent injunction and that was not part of the holding by the Court of Appeals.

D. Hours Expended

After a determination of the hourly rate, the Court must then determine, under *Hensley*, whether the number of hours claimed are reasonable.

The defendants first argue that the plaintiffs' first application for interim fees was untimely, since the application was not made in accord with Rule 54(d) of the Federal Rules of Civil Procedure or Local Rule 13(e) and was not made until after the first preliminary injunction was dissolved by order entered December 1, 1998. However, as the defendants note, this argument was raised in opposition to the plaintiffs' motion to file an application for interim fees. The motion was granted by order entered April 16, 1990 (Docket Entry No. 152), after considering the defendants' arguments.

The defendants argue that only $58,550.77 for Mr. Shafer, $10,966,96 for Mr. Pleasants, and $2,587.50, for a total of $72,105.23, should be awarded as attorney fees on the plaintiffs' first application for fees. The defendants have not challenged any fees incurred by the plaintiffs from May 14, 1997, until December 4, 1997. The defendants' challenges fall into three primary categories (1) work performed on issues upon which the plaintiffs did not prevail; (2) work performed on issues related to the writ of certiorari and prompt judicial review because the preliminary injunction was dissolved; and (3) "unspecific" work, i.e., work performed but the plaintiffs' time sheets are not specific enough to determine what the research or other work was. The defendants also challenge any work

performed related to discovery, pointing out that the plaintiffs were not successful in their discovery requests. *See* order entered October 22, 1998. It appears to the Court that some of the entries for discovery were related to the plaintiffs' responding to discovery. In addition, although the defendants prevailed in all but one respect in its motion for a protective order (Docket Entry No. 48), the Court did grant the plaintiffs minimal relief. Much of the work performed relating to discovery, specifically that work related to the defendants' motion for a protective order, should be disallowed.

The defendants also challenge any work performed by plaintiff's attorneys on the *Kallstrom* issue of disclosure. Although the defendants have related that it assured the plaintiffs that the information contained in the applications for licenses and permits would not be disclosed under the authority of *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998), the plaintiffs were apparently unpersuaded that *Kallstrom* provided sufficient authority. By order entered April 30, 1999 (Docket Entry No. 156), the Court directed that all personal information contained in applications of entertainers for permits be treated as submitted to the defendants under seal during the pendency of the case and not be released until the *Kallstrom* procedures have been afforded the applicants and by leave of Court. Although by agreement of the defendants, the plaintiffs did obtain judicial relief on this issue and attorney fees for work performed on this issue until April 30, 1999, should be included in the fees awarded.

The Court agrees with the defendants that attorney fees for work performed on matters upon which the plaintiffs did not prevail should not be awarded. However, the plaintiffs ultimately prevailed on the judicial review issue

and fees for work related to that issue should be awarded. The most problematic portion of the plaintiffs' fee request is for the work performed that is listed simply as "research" or other equally unspecific characterizations. The Court credits Mr. Shafer with setting forth with some specificity the issues about which work was performed in many entries. As the Supreme Court observed in *Hensley*, "[m]uch of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis." 461 U.S. at 436.

The following fees should be disallowed:

a. First Motion for Fees (Docket Entry No. 158)*

(1) Bradley Shafer (Docket Entry No. 161)

1/12/98: $300.00 disallowed. Although this entry includes other matters than "research for additional criminal disability issues," which the Court hereby disallows, the plaintiffs did not apportion the 3.8 hours among the matters noted.†

2/03/98: $445.00 disallowed.

2/10/98: $595.00 disallowed.

3/27/98: $402.50 disallowed.

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* Other filings related to this motion are Docket Entry Nos. 158-164, 170, 183-184, and 191.

† The Court notes that the identity of Mr. J. St. John is unclear. The defendant has not raised any objection about any conversations or meetings with Mr. St. John, so the Court will not address the issue.

4/06/98: $200.00 disallowed. Again, the plaintiffs did not apportion the time for "work on distance arguments," which is hereby disallowed.

4/28/98: $402.50 disallowed.

4/30/98: $560.00 disallowed.

5/3/98: $250.00 disallowed. It is not possible to determine how much of the entry was devoted to distance issues.

5/12/98: $650.00 disallowed.

5/13/98: $875.00 disallowed.

5/14/98: $275.00 disallowed. The defendants did not challenge approximately $100.00.

5/15/98: $525.00 disallowed.

5/21/98: $350.00 disallowed.

5/22/98: $600.00 disallowed.

5/26/98: $245.00 disallowed

5/26/98: $375.00 disallowed.

5/27/98: $375.00 disallowed.

5/28/98: $375.00 disallowed.

6/2/98: $300.00 disallowed. It is not clear whether "words objected to as vague" include "sexually oriented." The $300.00 is an approximate reflection of the research on dancer distance.

6/5/98: $100.00 disallowed to reflect research on dancer distance.

6/8/98: $912.50 disallowed.

6/9/98: $812.50 disallowed.

6/10/98: $625.00 disallowed.

6/11/98: $600.00 disallowed. The defendants did not challenge the $300.00 balance.

6/12/98: $650.00 disallowed.

6/13/98: $315.00 disallowed.

6/24/98: $250.00 disallowed.

7/1/98: $105.00 disallowed.

7/13/98: $762.50 disallowed.

7/16/98: $600.00 disallowed.

7/17/98: $325.00 disallowed.

7/20/98: $700.00 disallowed. The plaintiffs have not apportioned the time spent on research, which should be disallowed, and the time spent working on discovery responses,

7/22/98: $250.00 disallowed.

7/23/98: $927.50 disallowed. This is a perplexing entry since refers to "work on discovery to State and research for summary judgment arguments." There was no summary judgment motion filed and the State is not a party.

7/23/98: $475.00 disallowed. The defendants did not object to the balance of $237.50.

7/29/98: $35.00. Time spent talking to a reporter should be disallowed.

7/30/98: $262.50 disallowed.

7/31/98: $168.75 disallowed. The defendants did not object to the balance of $168.75.

8/4/98: $291.56 disallowed. The defendants did not object to the balance of $145.83.

8/5/98: $450.00 disallowed.

8/6/98: $400.00 disallowed.

8/10/98: $350.00 disallowed.

8/14/98: $650.00 disallowed.

8/20/98: $250.00 disallowed.

8/21/98: $418.50 disallowed. The defendants did not object to the balance of $418.50.

8/24/98: $400.00 disallowed. The defendants did not object to the balance of $400.00.

8/25/98: $250.00 disallowed, reflecting work on criminal disability.

8/26/98: $312.50 disallowed. The defendants did not object to the balance of $312.50.

8/27/98: $541.67 disallowed. The defendants did not object to the balance of $270.83.

8/28/98: $312.50 disallowed. The defendants did not object to the balance of $312.50.

9/1/98: $950.00 disallowed.

9/2/98: $887.50 disallowed.

9/3/98 through 9/26/98: All charges disallowed. *See* Docket Entry No. 161, at 21-23.

9/28/98: $287.50 disallowed.

9/29/98: $287.50 disallowed.

9/30/98: $375.00 disallowed.

10/6/98: $375.00 disallowed.

10/8/98: $400.00 disallowed, reflecting research on disclosures and distance.

10/12/98: $625.00 disallowed.

10/14/98: $900.00 disallowed.

10/22/98: $887.50 disallowed.

10/23/98: $812.50 disallowed.

10/26/98: $837.50 disallowed.

10/26/98: $300.00 disallowed.

10/27/98: $495.00 disallowed.

10/28/98: $862.50 disallowed.

10/28/98: $1095.00 disallowed.

10/29/98: $1137.50 disallowed.

10/29/98: $500.00 disallowed.

10/30/98: $662.50 disallowed.

11/1/98: 490.00 disallowed.

11/03/98: $822.50 disallowed.

11/03/98: $975.00 disallowed.

11/9/98: $927.50 disallowed.

11/16/98: 455.00 disallowed.

11/19/98: $595.00 disallowed.

11/22/98: $402.50 disallowed.

11/23/98: $662.50 disallowed.

12/03/98: $227.50 disallowed.

12/04/98: $287.50 disallowed.

12/07/98: $300.00 disallowed.

12/12/93: $2,030.00 disallowed.

12/13/98: $2310.00 disallowed.

12/15/93: $1000.00 disallowed.

12/17/98: $312.50 disallowed.

12/18/93: $287.50 disallowed.

12/30/98: $62.50 disallowed.

1/4/99: $375.00 disallowed.

1/5/99: $375.00 disallowed.

1/6/98: $1,172.50 disallowed.

1/8/98: $500.00 disallowed.

1/14/99: $787.50 disallowed.

1/18/99: $500.00 disallowed, assuming that research on "word definitions" may relate to the overbreadth of "sexually oriented."

1/18/99: $540.83 disallowed. The defendants did not challenge the balance of $104.17.

1/19/99: $912.50 disallowed.

1/20/99: $1320.00 disallowed.

1/20/99: $250.00 disallowed.

(2) Michael F. Pleasants (Docket Entry No. 164)

The defendants object to all of the charges set forth by Mr. Pleasants. *See* Attachment 4 to Docket Entry No. 159, as lacking specificity or relating to any issue upon which the plaintiffs did not prevail. The following fees should be disallowed:

9/28/98: $87.50 disallowed.

10/8/98: $43.75 disallowed.

10/30/98: $200.00, allocated as relating to the discovery ruling, disallowed.

(3) H. Louis Sirkin (Docket Entry No. 158)

The following hours shall be disallowed:

11/19/98: .25

11/20/98: 1.5

11/20/98: .5

12/15/98: 1.1

4/30/99: 2.0

b. Second Motion For Fees (Docket Entry No. 201)[10]

(1) Bradley J. Shafer (Docket Entry No. 203)

3/15/99: $600.00 disallowed.

3/17/99: $187.50 disallowed

3/18/99: $350.00 disallowed.

3/22/02: $255.00 disallowed

4/2/99: $800.00 disallowed.

4/5/99: $700.00 disallowed.

4/6/99: $137.50 disallowed.

4/7/99: $712.50 disallowed.

4/8/99: $687.50 disallowed of $2187.50.

4/8/99: $700.00 disallowed of $900.00.

4/9/99: $212.50 disallowed of $812.50.

(2) Michael F. Pleasants (Docket Entry No. 204)

The attorney fees set forth are either reasonable and, in some cases, it was impossible to parse out what work performed was on matters upon which the plaintiffs prevailed and matters upon which they did not prevail.

[10] Other filings related to this motion are Docket Entry Nos. 202-207, 214-215, and 229.

(3) H. Louis Sirkin (Docket Entry No. 205)

The attorney fees set forth are either reasonable and, in some cases, it was impossible to parse out what work performed was on matters upon which the plaintiff prevailed and matters upon which they did not prevail.

c. Third Motion for Fees (Docket Entry No. 240)[11]

The defendants apparently argue that the plaintiffs should only be entitled to $19,152.50, which reflects the work performed on the issue of judicial review upon which the plaintiffs prevailed on appeal.

That amount should be awarded. The question, however, remains whether the remaining fees requested for work on the appeals or any portion thereof is properly subject to an attorney fee award. Although the defendants scoff at what they contend was the limited success of the plaintiffs on the issue relating to the definition of "sexually oriented," since the Sixth Circuit held that such term can be easily severed from the ordinance, the bottom line is that the defendants had not severed the term from the ordinance, forcing the Court of Appeals to address the issue. The Court commented that "we are a bit confused as to why this definition had to be litigated at all, as Metropolitan Nashville argues strenuously in its brief that it is superfluous. . . . For whatever reason, Metropolitan Nashville saw fit to have us decide whether this apparently meaningless term must be removed from its Ordinance. We have and it must." 274 F.3d at 389. The Court further noted that "these constitutional issues would never have

[11] Other filings related to this motion are Docket Entry Nos. 241-242, 244, and 253.

arisen had the Ordinance been written more clearly. . . . Whatever difficulties inherent in writing laws, it is not too much to ask that municipalities carefully draft legislation intended to regulate protected activities." *Id.* at 388 n.2.

Whether or not the definition of "sexually oriented" or the severability of the term from the ordinance was an issue that should have merited work by either side, the fact is that the Sixth Circuit resolved it in favor of the plaintiffs and they should be compensated for that work.

Similarly, the plaintiffs should be compensated for work performed on issues of mootness and standing. The issue of whether the plaintiffs should be compensated for any work performed relating to the disclosure provisions is less clear. The defendants argued, inter alia, that information in the applications and permits is protected under *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998). The Sixth Circuit agreed, while rejecting three other arguments made by the defendants for the protection of such information. It is not insignificant for the plaintiffs that the Sixth Circuit has spoken definitively on this issue.

The Court further agrees with the plaintiffs that much of the work on appeal on the issues upon which the plaintiffs prevailed had to have been intertwined with work on issues upon which the plaintiffs did not prevail, and thus it is impossible to accurately apportion their time. For instance, time spent reviewing the defendants' filings or preparing for oral argument cannot easily be apportioned among the issues involved.

In an attempt to follow the *Hensley* dictates, two-thirds (⅔) of the fees requested in Mr. Shafer's affidavit (Docket Entry No. 242) and Mr. Shafer's attached

summary after the 4/3/00 entry and two-thirds (⅔) of the fees listed in the attached summary on behalf of the Pendergrass plaintiffs should be disallowed, with the exception of the 5/9/00 entry for $1,575.00, which should be allowed.

If this Report and Recommendation is adopted, the plaintiffs will have prevailed substantially on their requests for attorneys fees. Therefore, the amount of $31,527.50 requested by the Deja Vu plaintiffs for work on their requests for attorneys fees should be allowed.

E. Expenses

The defendants challenge the plaintiffs' request for an award of costs and expenses to the extent that they seek non-reimbursable expenses, such as "Federal Express or delivery services, meals, travel, computer research, postage and miscellaneous office expenses." Docket Entry No. 222, at 8. The plaintiffs' billing records are replete with charges for overnight delivery, without an explanation for why overnight delivery wash necessary. All such overnight delivery and delivery services charges should be disallowed.

The plaintiffs do not respond to the defendants' contention that the vast majority of their requested expenses should be disallowed. The plaintiffs' request for an award of expenses should be denied at this time, with leave to the plaintiffs to refile a motion for an award of expenses, responding to the defendants' argument, and explaining in detail why the expenses are properly reimbursable.

III. RECOMMENDATION

For the reasons stated above, the plaintiffs' first three motions for an award of attorney fees should be granted. However, the amounts listed above should be disallowed, and the amounts sought as expenses should be denied, with leave to the plaintiffs to refile a motion seeking only expenses with a detailed explanation of the necessity and propriety of such expenses.

Any objections to this Report and Recommendation must be filed with the Clerk of Court within ten (10) days of receipt of this notice, and must state with particularity the specific portions of this Report & Recommendation to which objection is made. Failure to file written objections within the specified time can be deemed a waiver of the right to appeal the District Court's order. *See Thomas v. Arn*, 474 U.S. 140 (1985); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

Respectfully Submitted,

/s/ Juliet Griffin
JULIET GRIFFIN
United States Magistrate Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC. et al.	]	
	]	No. 3-97-1066
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE et al.	]	No. 3-97-1176
	]	Judge Higgins

ORDER

(Entered Dec. 23, 1999)

In this action, as stated on the record at the hearing on December 21, 1999, it appears that no further or additional relief is sought beyond that which has been granted by the preliminary injunction.[1,2]

The preliminary injunction heretofore issued is herewith made a permanent injunction.

Accordingly, the defendants are permanently enjoined from enforcing Chapter 6.54 of the Metropolitan Code.

The applications for interim attorneys' fees shall be deemed final applications for fees in favor of the prevailing parties as of the conclusion of this litigation by the entry of this order.

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[1] See memorandum and order (entered October 4, 1999; Docket Entry Nos. 188-189) granting motions for preliminary injunction.

[2] There is no claim by the plaintiffs for money damages under 42 U.S.C. § 1983. Applications for interim attorneys' fees are now pending before the Magistrate Judge.

The entry of this order shall constitute the final judgment in this action.[3]

It is so ORDERED.

/s/ Thomas A. Higgins
Thomas A. Higgins
United States District Judge
12-21-99

[3] The plaintiffs' motion to show cause (filed June 15, 1999; Docket Entry No. 167) is denied in its entirety. The defendants' motion (filed July 2, 1999; Docket Entry No. 175) to strike is denied as moot. The plaintiffs' motion (filed June 15, 1999; Docket Entry No. 165) to strike is denied as moot.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC. et al.	]	
	]	
v.	]	No. 3-97-1066
	]	No. 3-97-1176
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE et al.	]	Judge Higgins

ORDER

(Entered Oct. 4, 1999)

In accordance with the memorandum contemporaneously entered, the plaintiffs' motions (filed December 17, 1998; Docket Entry Nos. 81 and 83) for a preliminary injunction are granted.[1]

Accordingly, the defendants are enjoined from enforcing Chapter 6.54 of the Metropolitan Code, pending the adjudication of these cases on the merits and entry of a final judgment.

It is so ORDERED.

/s/ Thomas A. Higgins
Thomas A. Higgins
United States District Court
10-1-99

[1] The plaintiffs' motion (filed June 15, 1999; Docket Entry No. 165) to strike the defendants' notice of filing (filed June 7, 1999; Docket Entry No. 157) is granted insofar as the notice relates to the plaintiffs' second motions (Docket Entry Nos. 81 and 83) for preliminary injunction. However, the plaintiffs' motion is denied in all other respects.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC., et al.	]	
v.	]	No. 3-97-1066
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE, et al.	]	No. 3-97-1176
	]	Judge Higgins

MEMORANDUM

(Entered Oct. 4, 1999)

The plaintiffs in this case are adult-oriented establishments, including adult cabarets, adult bookstores, and adult video stores in Metropolitan Nashville and Davidson County, Tennessee, owners and operators of such establishments, and individual dancers who perform at such establishments. On August 19, 1997, the Council of The Metropolitan Government of Nashville and Davidson County enacted Chapter 6.54 of the Metropolitan Code, Bill No. 097-796. This Chapter, and subsequently enacted amendments to it, require "sexually oriented" businesses to obtain a license to operate and entertainers who perform in such establishments to obtain a permit.

The initial plaintiffs in this case, Deja Vu of Nashville, Inc.; Michael Rucker; Michael Butler; Meroney Entertainment, Inc.; The Pleasure Palace, Inc.; Carousel Amusement Center, Inc.; Dawn Pierce; and Elizabeth

Martez,[1] filed this action on October 17, 1997, against The Metropolitan Government of Nashville and Davidson County, and Emmitt Turner, Chief of Police of the Metro Police Department, in his official capacity, seeking a preliminary injunction, permanent injunction and declaratory judgment determining the constitutionality of Chapter 6.54. *See also,* motion (filed October 17, 1997; Docket Entry No. 2) for issuance of a preliminary injunction. On December 1, 1997, a hearing was held before the Honorable John T. Nixon on the motions (Docket Entry Nos. 2 and 11) for a preliminary injunction. On the basis that the ordinance did not provide the proper procedural requirements for a prior restraint of expression protected by the First Amendment, the Court enjoined the defendants from enforcing the ordinance. Memorandum and order (entered December 8, 1997, Docket Entry Nos. 22 and 23) (Nixon, J.). After the Metro Council amended the ordinance to correct the defects upon which the preliminary injunction was based, the Court dissolved the injunction. Order (entered December 3, 1998, Docket Entry No. 76) (Nixon, J.).[2]

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[1] Mr. Jerry C. Pendergrass, The 822 Corporation, and 421 Corporation subsequently initiated their own action (No. 3-97-1176) also seeking preliminary injunction, and sought to intervene in this action. Motion (filed December 17, 1998; Docket Entry No. 11) to intervene and for preliminary injunction. The Court consolidated the actions, deemed the Pendergrass et al. motion to intervene moot, and treated the plaintiffs' motions (Docket Entry Nos. 2 and 11) jointly. Memorandum and order (entered December 8, 1997, Docket Entry Nos. 22 and 23) (Nixon, J.).

[2] On December 16, 1998, the plaintiffs filed a motion (Docket Entry No. 77) for a stay pending appeal and on December 31, 1998, filed a notice of appeal (Docket Entry No. 94). Judge Nixon recused himself and the case was reassigned to The Honorable Aleta Trauger. *See* order (Docket Entry No. 97) (Nixon, J.). A hearing on the motions for stay

(Continued on following page)

The plaintiffs' second motion (filed December 17, 1998; Docket Entry No. 83) for preliminary injunction, which is now before the Court,[3],[4] is based on claims previously reserved by the plaintiffs. *See* plaintiffs' motion (Docket Entry No. 2) for preliminary injunction.[5] In their second

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pending appeal and for preliminary injunction was held on January 13, 1999, and the motion for stay was denied. Order (entered January 26, 1999; Docket Entry No. 114) (Trauger, J.). The motions (Docket Entry Nos. 81 and 83) for preliminary injunction were set for further hearing on January 27, 1999. Order (entered January 26, 1999; Docket Entry No. 115) (Trauger, J.). By order (Docket Entry No. 109) entered January 20, 1999, the Pendergrass et al. motion (filed December 16, 1998; Docket Entry No. 80) to file an amended complaint was granted, and the amended complaint (Docket Entry No. 121) was filed January 20, 1999.

[3] By order (Docket Entry No. 122) entered February 3, 1999, Judge Trauger recused herself and the case was reassigned to Judge Nixon. By order (Docket Entry No. 124) entered February 18, 1999, Judge Nixon returned the case to the clerk for reassignment. The case was assigned to this Court.

[4] Also before the Court is the plaintiffs' memorandum (filed December 17, 1998; Docket Entry No. 84) in support; the motion (filed December 17, 1998; Docket Entry No. 81) of Jerry Pendergrass and The 822 Corporation for preliminary injunction and their memorandum (Docket Entry No. 82) in support; the plaintiffs' supplemental brief (filed December 31, 1998; Docket Entry No. 96) in support of their second motion for preliminary injunction; the defendants' memorandum (filed January 8, 1999; Docket Entry No. 104) in opposition; the plaintiffs' reply (filed January 22, 1999; Docket Entry No. 111); the defendants' response (filed January 22, 1999; Docket Entry No. 112); and the response (filed January 22, 1999; Docket Entry No. 113) of Jerry C. Pendergrass, The 822 Corporation and 421 Corporation.

[5] Also before the Court is the defendants' notice of filing (filed June 7, 1999; Docket Entry No. 157) with attached letters dated May 26, 1999, from the Sexually Oriented Business Licensing Board, informing Metro News c/o Jerry Pendergrass; Madam X c/o C.L. Steele; Purple Onion II c/o C.L. Steele; Purple Onion I c/o C.L. Steele; Ken's Gold Club c/o Ken Meroney; and Mr. Mike Rucker c/o Deja Vu; that their applications for sexually oriented business licenses have been approved; the plaintiffs' motion (filed June 15, 1999; Docket Entry No. 165) to strike

(Continued on following page)

motion, the plaintiffs contend that, both facially and as applied, Chapter 6.54 violates the First and Fourteenth Amendments to United States Constitution. The plaintiffs also assert that the defendants are collaterally estopped from relitigating the constitutionality of some provisions of the ordinance which were present in a predecessor ordinance to Chapter 6.54, and which the Court found unconstitutional in *Ellwest Stereo Theater v. Boner,* 718 F. Supp. 1553 (M.D. Tenn. 1989) (Higgins, J.). In their motion (Docket Entry No. 81) Mr. Pendergrass and The 822 Corporation reassert their earlier claim that the civil disabilities provision of the ordinance are unconstitutional. *See* motion (Docket Entry No. 81) for preliminary injunction and memorandum (Docket Entry No. 82) in support. Accordingly, the plaintiffs seek declaratory relief in the form of a preliminary injunction under Fed. R. Civ. P. 57 and 28 U.S.C. §§ 2201 and 2202.

The Court has jurisdiction over this matter under 42 U.S.C. § 1983, 28 U.S.C. §§ 1331, 1334(3) and §§ 2201 and 2202. The motions were heard on oral testimony from April 13 to April 16, 1999. For the reasons set forth below, the plaintiffs' motions for preliminary injunction shall be granted.

I.

The Court must consider the following four factors in determining whether or not to grant a preliminary injunction:

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defendants' notice of filing; their brief (Docket Entry No. 166) in support; and the defendants' response (filed June 28, 1999; Docket Entry No. 174).

> (1) the plaintiff's likelihood of success on the merits; (2) whether the plaintiff could suffer irreparable harm without the injunction; (3) whether granting the injunction will cause substantial harm to others; and (4) the impact of the injunction on the public interest.

Connection Distrib. Co. v. Reno, 154 F.3d 281, 288 (6th Cir. 1998) (quoting *Golden v. Kelsey-Hayes Co.,* 73 F.3d 648, 653 (6th Cir. 1996), *cert. denied,* 519 U.S. 807, 117 S.Ct. 49, 136 L.Ed.2d 12 (1996)). The general rule with respect to these factors is that courts are not to give greater weight to any one factor in particular, but are to balance them. *Id.*

When a preliminary injunction is sought because rights guaranteed by the First Amendment are potentially at stake, the first factor, likelihood of success on the merits, will be determinative. *Id.* The Supreme Court of the United States has stated that "'loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.'" *Id.* (quoting *Elrod v. Burns,* 427 U.S. 347, 373, 96 S.Ct. 2573, 2690, 49 L.Ed.2d 547, 565 (1976) (plurality) and *citing Newsom v. Norris,* 888 F.2d 371, 378 (6th Cir. 1989) for the proposition that "even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief."). Therefore, "to the extent that [a party] can establish a substantial likelihood of success on the merits of its First Amendment claim, it also has established the possibility of irreparable harm as a result of the deprivation of the claimed free speech rights." *Id.* (citation omitted). Additionally, because "'it is always in the public interest to prevent the violation of a party's constitutional rights,'" harm to the public interest is also

established by showing a substantial likelihood of success on the merits. *Id.* (quoting *G & V Lounge. Inc. v. Michigan Liquor Control Comm'n,* 23 F.3d 1071, 1079 (6th Cir. 1994)).

II.

Sexually explicit, non-obscene performances and materials are expressions protected by the First Amendment to the United States Constitution. *Young v. American Mini Theatres, Inc.,* 427 U.S. 50, 70, 96 S.Ct. 2440, 2452, 49 L.Ed.2d 310, 326 (1976). However, society is considered to have less interest in protecting this kind of expression than in protecting other kinds of speech. *Id.* Consequently, sexually explicit expression falls within the "outer perimeters of the First Amendment." *Barnes v. Glen Theatre, Inc.,* 501 U.S. 560, 566, 111 S.Ct. 2456, 2460, 115 L.Ed.2d 504, 511 (1991); *see also, Richland Bookmart. Inc. v. Nichols,* 137 F.3d 435, 438 (6th Cir. 1998). Accordingly, the type of expression which Chapter 6.54 of the Metropolitan Code seeks to regulate is on the "outer perimeters" of expression protected by the First Amendment. *Id.*

Under the due process requirement of the Fourteenth Amendment to the United States Constitution, laws must clearly define the conduct they proscribe. *Grayned v. City of Rockford,* 408 U.S. 104, 108, 92 S.Ct. 2294, 2298, 33 L.Ed.2d 222, 227 (1972). The vagueness of laws that attempt to regulate speech raises "special concerns under the Federal Constitution's First Amendment because of the obvious chilling effect of such regulations on free speech." *Reno v. ACLU,* 521 U.S. 844, 845, 117 S.Ct. 2329, 2332, 138 L.Ed. 874, 876 (1997). Such laws must "give the person of ordinary intelligence a reasonable opportunity to

know what is prohibited, so that he may act accordingly." *Grayned,* 408 U.S. at 108, 92 S.Ct. at 2298, 33 L.Ed.2d at 227. This requirement was explained as follows:

> [v]ague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant danger of arbitrary and discriminatory application. Third, but related, where a vague statute "abut[s] upon sensitive areas of basic First Amendment freedoms," it "operates to inhibit the exercise of [those] freedoms." Uncertain meanings inevitably lead citizens to "'steer far wider of the unlawful zone' . . . than if the boundaries of the forbidden areas were clearly marked."

Id. (footnotes omitted).

In determining whether an ordinance is impermissibly vague, the Court "'must extrapolate its allowable meaning'" while keeping in mind the prohibition on federal courts from construing state statutes. *Id.,* 408 U.S. at 110, 92 S.Ct. at 2300, 33 L.Ed.2d at 228 (quoting *Garner v. Louisiana,* 368 U.S. 157, 174, 82 S.Ct. 248, 257, 7 L.Ed.2d 219 (1961)). In doing so, the Court is "'relegated . . . to the words of the ordinance itself', to the interpretations [other courts] have given to analogous statutes, and, perhaps to some degree, to the interpretation of the statute given by those charged with enforcing it." *Id.* (quoting *Coates v. Cincinnati,* 402 U.S. 611, 614, 91 S.Ct. 1686, 1688, 29 L.E.2d 214, 217 (1971)).

A law will be considered impermissibly vague if it "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Const. Co.*, 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed.2d 322, 328 (1926). However, if the meaning of the law is commonly understood, it will not be considered vague. *See United States v. J.T. Haun*, 90 F.3d 1096, 1101 (6th Cir. 1996). Additionally, the prohibited conduct need not be defined with mathematical precision. *Columbia Natural Resources, Inc. v. Tatum*, 58 F.3d 1101, 1108 (6th Cir. (1995). Nor is a law vague because it "'requires a person to conform his conduct to an imprecise but comprehensible normative standard.'" *Id.* (quoting *United States v. Angiulo*, 897 F.2d 1169, 1179 (1st Cir.), *cert. denied*, 498 U.S. 845, 111 S.Ct. 130, 112 L.Ed.2d 98 (1990)).

In addition, laws which are overbroad, threatening the exercise of First Amendment rights, are unconstitutional. *Broadrick v. Oklahoma*, 413 U.S. 601, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973). Recognizing that the application of the overbreath doctrine is "'strong medicine,'" the Supreme Court has employed it with hesitation and then 'only as a last resort.'" *New York v. Ferber*, 458 U.S. 747, 769, 192 S.Ct. 3348, 3361, 73 L.Ed.2d 1113, 1130 (1982) (quoting *Broadrick*, 413 U.S. at 613, 93 S.Ct. at 2916, 37 L.Ed.2d at 840).

Moreover, the overbreath must be substantial when the protected expression involves conduct and not speech Only. *Id.*, 458 U.S. at 770, 102 S.Ct. at 3361, 73 L.Ed.2d at 1131 (citing *Broadrick*, 413 U.S. at 615, 93 S.Ct. at 2918, 37 L.Ed.2d at 842). Accordingly, a regulation should not be invalidated for overbreath if it marginally infringes on First Amendment freedoms. *Id.*, 458 U.S. at 770 n.25, 192

S.Ct. at 3362 n.25, 73 L.Ed.2d at 1131 n.25. A law is substantially overbroad if it "reaches a substantial number of impermissible applications," *Ferber*, 458 U.S. at 771, 102 S.Ct. at 3362, 73 L.Ed.2d at 1132, "judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 615, 93 S.Ct. at 2918, 37 L.Ed.2d at 842. Additionally, laws are unconstitutional if they impose restrictions so broad they cause concern over violating the law thereby, creating a "chilling effect" that curtails the availability of non-obscene expression. *Smith v. California*, 361 U.S. 147, 80 S.Ct. 215, 4 L.Ed.2d 205 (1959); *see also, Bantam Books v. Sullivan*, 372 U.S. 58, 83 S.Ct. 631, 9 L.Ed.2d 584 (1962).

A facial challenge can be raised on behalf of others under an exception to the ordinary standing requirements on the basis that a law is substantially overbroad. *Regan v. Time*, 468 U.S. 641, 650, 104 S.Ct. 3262, 3268, 82 L.Ed.2d 487, 496 (1984). To prevail on such an attack, the plaintiff must establish that there is "a realistic danger that the statute itself will significantly compromise recognized First Amendment protections of parties not before the Court.'" *New York State Club Assn. v. New York City*, 487 U.S. 1, 11, 108 S.Ct. 2225, 2233, 101 L.Ed.2d 1, 15 (1988) (quoting *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 801, 104 S.Ct. 2118, 2126, 80 L.Ed.2d 772, 784 (1984)).

Due to concerns of federalism that arise when a federal court reviews the constitutionality of a state regulation that is challenged as unconstitutionally vague or overbroad, the reviewing court may not supply a limiting construction in order to save the regulation from being unconstitutional. *Triplett Grille, Inc. v. City of Akron*, 40 F.3d 129, 136 (6th Cir. 1994) (citing *Eubanks v. Wilkinson*,

937 F.2d 1118, 1122 (6th Cir. 1991) for the proposition that "federal 'courts do not rewrite statutes to create constitutionality.'").

Under our First Amendment jurisprudence, protected expressions may be subject to "reasonable time, place or manner" restrictions. *Barnes*, 501 U.S. at 566, 111 S.Ct. at 2461, 115 L.Ed.2d at 511 (1991) (citing *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221, 227 (1984)). Such a regulation is valid if:

> 1. If it is within the constitutional power of the government;
>
> 2. If it furthers an important or substantial governmental interest;
>
> 3. If the government interest is unrelated to the suppression of free expression; and
>
> 4. If the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[6]

Id., 501 U.S. at 567, 111 S.Ct. at 2461, 115 L.Ed.2d at 512 (quoting *United States v. O'Brien*, 391 U.S. 367, 377, 88 S.Ct. 1673, 1679, 20 L.Ed.2d 672, 680 (1968)). The United States Court of Appeals for the Sixth Circuit and other

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[6] In *Clark*, the Supreme Court noted that the four part *O'Brien* test for reviewing the constitutionality of regulations of expressive conduct is really the same test as that for time, place, or manner regulations. *Clark*, 468 U.S. at 298, 104 S.Ct. at 3070, 82 L.Ed.2d at 230. This test asks whether the law is content neutral, is "designed to serve a substantial government interest, and allows alternative avenues of communication." *Richland Bookmart*, 137 F.3d at 440.

courts have applied this test when reviewing the constitutionality of laws regulating sexually oriented businesses. *See DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 410 (6th Cir. 1997); *Ellwest*, 718 F. Supp. at 1562; *Genusa v. City of Peoria*, 619 F.2d. 1203 (7th Cir. 1980).

III.

The plaintiffs do not contest that The Metro government has the constitutional power to enact Chapter 6.54. The plaintiffs contend that Chapter 6.54 is invalid under the second element of the *O'Brien* test because it does not further an important or substantial governmental interest.

The preamble to Chapter 6.54 states that the purpose of the ordinance is "to promote the health, safety, morals and general welfare of the citizens of Metropolitan Nashville Davidson County." Plaintiffs' exhibit 6. In *Barnes*, the United States Supreme Court upheld Indiana's public indecency statute which was "designed to protect morals and public order," stating that "[t]he traditional police powers of the States is defined as the authority to provide for the public health, safety, and morals and we have upheld such as a basis for legislation." *Barnes*, 501 U.S. at 569, 11 S.Ct. at 2462, 115 L.Ed.2d at 513. Moreover, a "city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect." *American Mini Theatres*, 427 U.S. at 71, 96 S.Ct. at 2452, 49 L.Ed.2d at 327.

The evidence reflects that when considering Chapter 6.54, the Metro Council reviewed relevant information and studies from other cities and states evaluating the problems caused by the presence of adult entertainment

establishments. *See* notice (filed April 12, 1999; Docket Entry No. 147).[7] Specifically, the Metro Council relied on studies from Minnesota, Phoenix, Tucson, Arizona, and Austin, Texas. These studies indicated that the secondary effects of adult entertainment establishments threaten the health, safety, and welfare of the citizens where they are located. *Id.*

The Metro Council also relied on information collected in Nashville, including: (1) a report from the Metro Police Department stating that undercover officers observed substantial physical contact between dancers in adult entertainment establishments and the patrons of these establishments and that the undercover officers were successful in soliciting prostitution from several women at various establishments; (2) a report from the Metropolitan Health Department of Nashville and Davidson County of an, inspection of ten adult entertainment establishments on April 16 and 17, 1997, which stated that "the presence of fresh suspected body fluid was evident in six of the ten establishments inspected;" and (3) a Metropolitan Police Department Intelligence Division Report showing that between January 1, 1996, and January 31, 1997, there were 924 dispatched calls[8] to 36 adult entertainment establishments, of which, 682 required police assistance

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[7] A city may rely on studies and experiences of other cities in determining whether a regulation furthers a substantial governmental interest. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 51, 106 S.Ct. 925, 931, 89 L.Ed.2d 29, 40 (1986).

[8] These calls included: 30 drunk calls, 189 police assistance calls, 143 disorderly calls, 27 vehicle accident calls, 95 theft calls, 45 robbery calls, 24 weapons calls, 32 fighting calls, 64 burglary alarm calls, and 33 tavern check calls. Notice (Docket Entry No. 147) at tab 3.

and involved, possible violations of laws or ordinances. *Id.* at tab 3.

In light of these studies and reports, the Metro Council set forth in the preamble to Chapter 6.54 the findings that: (1) sex acts are a regular occurrence at adult entertainment establishments in Davidson County, especially were there are private or semi-private booths for viewing films or live sex shows; (2) that certain employees of adult entertainment establishment engage in higher incidents of unlawful activities than others; (3) that the sex acts and resulting unsanitary conditions occurring at some adult entertainment establishments are the result of the failure of the management of those establishments to regulate activities within those establishments; and (4) that other illegal or unhealthy activities occur as a consequence of these conditions. *See* plaintiffs' exhibit 6. The findings also include the statistics on the number of cases of sexually transmitted diseases, including acquired immunodeficiency syndrome (AIDS), gonorrhea, and syphilis in Tennessee and Davidson County. *Id.*

Based on the information relied upon by the Metro Council in promulgating Chapter 6.54, and its resulting findings as stated in the preamble, the Court finds that the Metro Council's purpose in enacting Chapter 6.54 was "to promote the health, safety, morals and general welfare of the citizens of Metropolitan Nashville Davidson County" by reducing the spread of diseases which thrive in the conditions created by unregulated adult entertainment establishments and to combat the illegal activity that occurs within and around such establishments. Plaintiffs exhibit 6. Accordingly, the Court finds that the ordinance was promulgated to further an important and substantial governmental interest.

The plaintiffs further contend that Chapter 6.54 is invalid under the third element of the *O'Brien* test because it is a content-specific regulation, aimed at suppressing free expression.

The Court agrees that the regulation pertains exclusively to sexually explicit expression. However, because Chapter 6.54 is focused on the secondary effects of the expression, it will be treated as a content-neutral time, place, or manner regulation.[5] *Richland Bookmart*, 137 F.3d at 439-40. Therefore, the third element of the *O'Brien* test has been met.

The plaintiffs also contend that various portions of the ordinance do not satisfy the fourth element of the *O'Brien* test. The requirement that a regulation must be narrowly tailored to serve the government's interest does not require that the regulation be the "least restrictive or least intrusive means of doing so." *Ward v. Rock Against Racism*, 491 U.S. 781, 798, 109 S.Ct. 2746, 2757-58, 105 L.Ed.2d 661, 679 (1989). Instead, a time, place, or manner

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[5] In *Richland Bookmart*, 137 F.3d at 439-40, the Sixth Circuit found that a regulation which focused exclusively on sexually explicit speech was content-specific on its face. However, the Court explained that although content-specific regulations are generally presumed to be unconstitutional and are subject to strict scrutiny, the Supreme Court has created a legal fiction under which regulations of erotic or sexually explicit expression are treated as if they are content-neutral providing that the regulation is really aimed at the secondary effects of the speech, rather than at the speech itself. *Id.* at 440 (*citing City of Renton*, 475 U.S. at 49, 106 S.Ct. at 929-30, 89 L.Ed.2d at 38-40 and *American Mini Theatres*, 427 U.S. at 70, 96 S.Ct. at 2452, 49 L.Ed.2 at 340). The Supreme Court explained that regulations focusing on sexually explicit expression may be treated differently than regulations of other expression because the interest in protecting sexually explicit speech is marginal. *American Mini Theatres*, 427 U.S. at 72, 96 S.Ct. at 2452, 49 L.Ed.2d at 340.

regulation is narrowly tailored "[s]o long as the means chosen are not substantially broader than necessary to achieve the government's interest." *Id.*, 491 U.S. at 800, 109 S.Ct. 2758, 105 L.Ed.2d at 679.

A. Civil Disabilities Provision[10]

The plaintiffs contend that the civil disabilities provision of Chapter 6.54 is not narrowly tailored to serve the government's interest. They also contend that the defendants are collaterally estopped from relitigating the constitutionality of the civil disabilities provision based on the Court's decision in *Ellwest*, 418 F. Supp. at 1568, that the civil disabilities provision in the predecessor ordinance was not narrowly tailored to serve the government's interest. The plaintiffs also challenge the civil disabilities provision as an impermissible prior restraint on their First Amendment rights.

The ordinance requires that sexually oriented corporations, corporate stockholders holding a majority share of stock who will be involved in the day to day operation of the business, officers, and directors be licensed. Plaintiffs' exhibit 5 at §§ 6.54.040(A)(1)&(4). Individual entertainers must also obtain a permit. Chapter 6.54.060(A).

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[10] The parties refer to these provisions as the criminal disabilities provisions but in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231, 110 S.Ct. 596, 607, 107 L.Ed.2d 603, 621 (1990), the Supreme Court refers to a similar provision as the civil disabilities provision. The Supreme Court did not reach the merits of the plaintiff's challenge to the civil disabilities provision in *FW/PBS* because the Court found that the plaintiffs did not have standing to challenge the provision. *Id.*, 493 U.S. at 233, 110 S.Ct. at 608, 107 L.Ed. 2d at 623.

Under the civil disabilities provision of the ordinance, no individual applicant for a license or permit who has had a misdemeanor conviction for a crime of a sexual nature[11] may receive a license or permit for two years following the date of the conviction and no applicant who has had a felony conviction for a crime of a sexual nature may receive a license or permit for five years following the date of the conviction. *Id.* at §56.54.050(B)(2) and 6.54.080(A)(2).

1. *standing*

That "[t]he federal courts are under an independent obligation to examine their own jurisdiction, and standing 'is perhaps the most important of [the jurisdictional] doctrines.'" *FW/PBS*, 493 U.S. at 231, 110 S.Ct. at 607, 107 L.Ed.2d at 621 (quoting *Allen v. Wright*, 468 U.S. 737, 750, 104 S.Ct. 3315, 3324, 82 L.Ed.2d 556, 569 (1984)). The party seeking to exercise jurisdiction must "'clearly allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute.'" *Id.*, 493 U.S. at 231, 110 S.Ct. at 608, 107 L.Ed.2d at 622 (quoting *Warth v.*

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[11] "Chapter 6.54.010(C) defines "crimes of a sexual nature" as:

> the crimes of rape, aggravated rape, aggravated sexual assault, public indecency, statutory rape, rape of a child, sexual exploitation of a minor, indecent exposure, prostitution, patronizing prostitution, promoting prostitution, obscenity, or crimes committed in a jurisdiction other than Tennessee which, if committed in this state, would have constituted the crimes listed above. In the event that a felony from a jurisdiction other than Tennessee is not a named felony in this state, the elements of the offense shall be used to determine what classification the offense is given.

Plaintiffs' exhibit 5.

Seldin, 422 U.S. 490, 518, 95 S.Ct. 2197, 2215, 45 L.Ed.2d 343, 366 (1975)). A party asserting standing must prove:

> (1) "injury in fact," by which we mean an invasion of a legally protected interest that is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical; (2) a causal relationship between the injury and the challenged conduct, by which we mean that the injury fairly can be traced to challenged action of the defendant, and has not resulted from the independent action of some third party not before the court; and (3) a likelihood that the injury will be redressed by a favorable decision, by which we mean that the prospect of obtaining relief from the injury as a result of a favorable ruling is not too speculative.

DLS, 107 F.3d at 414 (citing (*G & V Lounge*, 23 F.3d at 107).

Accordingly, to establish standing to challenge the civil disabilities provision of the ordinance, individual plaintiffs must show that they are required to obtain a permit or license under the ordinance and that they will be unable to do so because they were convicted of a misdemeanor of a sexual nature within two years of their application, or that they were convicted of a felony of a sexual nature within five years of their application. *See FW/PBS*, 493 U.S. at 234, 110 S.Ct. at 609, 107 L.Ed.2d at 624. In order for a sexually oriented business to have standing, it must show that it will be unable to obtain a license because an individual applicant, such as a corporate director or officer who is required to be licensed in order for the business to be licensed, will be ineligible to obtain a license due to the civil disabilities provision.

Deja Vu and Mr. Michael Butler assert that they have standing to challenge the civil disabilities provision of the ordnance. As a sexually oriented business, Deja Vu is required to be licensed under Chapter 6.54. Michael Butler and Deja Vu contend that Mr. Butler is a former vice-president of Deja Vu and that if he were still a vice-president he would also be required to obtain a license.[12] The plaintiffs presented evidence that in November of 1994, Mr. Butler was convicted under the Uniform Code of Military Justice with felony statutory rape.[13] Mr. Butler's conviction was for a felony of a sexual nature and was within five years of March 15, 1999, when Chapter 6.54.030(F) would have required him to apply for a licence. Accordingly, Mr. Butler would be prohibited from obtaining a license under the civil disabilities provision of Chapter 6.54. Deja Vu argues that it also has standing because if Mr. Butler had remained a vice-president, it would have been unable to obtain a license to operate under the civil disabilities provision of the ordinance because, in order to do so, Mr. Butler would have had to be licensed.

The Court finds that because Mr. Butler is no longer employed by Deja Vu as a vice-president, he is no longer required to obtain a license as a corporate officer of Deja Vu. Additionally, Deja Vu would not be prohibited from receiving a license based on Mr. Butler's conviction. Accordingly, neither Mr. Butler nor Deja Vu have standing

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[12] Mr. Butler testified that he resigned from his position at Deja Vu in November of 1998, only because of the licensing requirement.

[13] Mr. Bulter testified to this fact and also submitted an affidavit affirming it. Affidavit (filed December 17, 1998; Docket Entry No. 86) of Michael Butler.

to challenge the constitutionality of the civil disabilities provision of the ordinance.

Mr. Pendergrass and The 822 Corporation also challenge the civil disabilities provisions of the ordinance. The plaintiffs aver that Metro News, which is owned by The 822 Corporation, is a theater and retail bookstore dealing in the display and retail sale and rental of printed and pictorial materials of an erotic and sexual nature, and is, therefore, a sexually oriented bookstore required to be licensed under Chapter 6.54. Mr. Pendergrass is the sole shareholder, an officer, and a director of The 822 Corporation. Therefore, in order for The 822 Corporation to be licensed under the ordinance, Mr. Pendergrass must also be licensed. At the hearing, Mr. Pendergrass testified that he was convicted on May 22, 1997, of a misdemeanor obscenity offense in Hamilton County, Tennessee. He was required to apply for a license in Nashville by March 15, 1999, within two years of the date of that conviction. Therefore, pursuant to the civil disabilities provision of the ordinance, Mr. Pendergrass, and consequently The 822 Corporation, would be ineligible for a license. Accordingly, the Court finds that Mr. Pendergrass and The 822 Corporation have standing to challenge the civil disabilities provision of the ordinance.[14]

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[14] In their motion (Docket Entry No. 165) to strike the defendants' notice (Docket Entry No. 157), the plaintiffs' contend that the notice goes to the issue of whether the plaintiffs have standing to challenge certain aspects of the licensing provisions in Chapter 6.54 in their second motions (Docket Entry Nos. 81 and 83) for preliminary injunction. They argue that their motion to strike should be granted because at the end of the hearing on the plaintiffs' motions, the Court stated:

(Continued on following page)

2. *collateral estoppel*

The plaintiffs claim that the defendants are collaterally estopped from relitigating the constitutionality of the civil disabilities provision of the ordinance based on the Court's holding in *Ellwest* that the civil disabilities provision of the predecessor ordinance was unconstitutional because it was not narrowly tailored to serve the government's interest.

The defendants assert that collateral estoppel does not apply to bar relitigation of any provisions in Chapter 6:54 because "[t]he law regulating sexually explicit expression has changed over the past ten years such that regulations that may have been unconstitutional in 1989 may be constitutional now." Defendants' memorandum (Docket Entry No. 104) at 15.

Collateral estoppel does not apply when there has been a significant change in the applicable law. *Disabled Am. Veterans v. Commissioner of Internal Revenue*, 942 F.2d 309, 313 (6th Cir. 1991); *see also, Steen v. John*

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this is the evidentiary record on the application for preliminary injunction and when we close here today this is going to constitute the record.

Plaintiff's brief (Docket Entry No. 166) in support at 2.

Accordingly, the Court finds that the record for the motions (Docket Entry Nos. 81 and 83) for second preliminary injunction was closed at the end of the evidentiary hearing on April 15, 1999. As the defendants have not been granted leave to file additional materials, the Court shall grant the plaintiffs' motion (Docket Entry No. 165) to strike insofar as the notice relates to the plaintiffs' motions (Docket Entry Nos. 81 and 83). Accordingly, the defendants' notice will not be considered evident in support of, or in opposition to, the plaintiffs' second motions for preliminary injunction. However, the plaintiffs' motion (Docket Entry No. 165) to strike shall be denied in all other respects.

Handcock Mut. Life Ins. Co., 106 F.3d 904, 913 (9th Cir. 1997). The Supreme Court has found that such a change may occur when there is a "'judicial declaration intervening between the two proceedings . . . a modification or growth in legal principles as enunciated in intervening decisions of this Court . . . [or] an interposed alteration in the pertinent statutory provisions.'" *Disabled Am. Veterans*, 942 F.2d at 313 (quoting *Sunnen v. Commissioner of Internal Revenue*, 333 U.S. 591, 600, 68 S.Ct. 715, 720, 92 L.Ed. 898, 907 (1948)).

The defendants have not established that there has been a sufficient change in the case law between the time the Court rendered its decision in *Ellwest* and now regarding the provisions of the ordinance that the plaintiffs contend the defendants cannot relitigate.

The defendants also argue that collateral estoppel does not apply because the precise issues raised in this case are different from those litigated in *Ellwest*. In order for litigation of an issue to be barred based on collateral estoppel, "the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding." *N.A.A.C.P. Detroit Branch v. Detroit Police Officer's Assoc.*, 821 F.2d 329, 330 (6th Cir. 1987) (footnote omitted).[15] The defendants contend that the issues in this case are different than the issues in *Ellwest* because the purpose of the ordinance in *Ellwest* was only to protect the

[15] Collateral estoppel also requires that a "determination of the issue must have been necessary to the outcome of the prior proceeding; that the prior proceeding must have resulted in a final judgment on the merits; and that the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issues in the prior proceeding." *N.A.A.C.P., Detroit Branch*, 821 F.2d at 330.

health of the citizens of Nashville and Davidson County, whereas the purpose of Chapter 6.54, presently before the Court, is the broader purpose of promoting "the health, safety, morals, and general welfare of the citizens of Metropolitan Nashville Davidson County." Defendants' memorandum (Docket Entry No. 104) at 17.

The record reflects that the first paragraph of the ordinance under consideration in *Ellwest* states that the purpose of the ordinance is to protect and promote the "general welfare, health, and safety" of Nashville's citizens. Plaintiffs' reply (filed January 22, 1999; Docket Entry No. 111) to defendants' memorandum of law in opposition. Accordingly, the purpose of Chapter 6.54 is broader only insofar as it also states that its purpose is to protect the morals of the citizens of Nashville.

The Court finds that the fact that the government added that the purpose of the ordinance is to protect the morals of the citizens is not sufficient to change the issue of the constitutionality of the ordinance. Accordingly, collateral estoppel is not inapplicable based on the allegedly broader purpose of Chapter 6.54.

With respect to the civil disabilities provision in particular, the defendants assert that collateral estoppel does not apply because the issue with respect to the constitutionality of the civil disabilities provision in this case is different from that in *Ellwest*. In *Ellwest*, the ordinance provided that applications for permits and licenses were to be denied if the applicant had been convicted or pleaded *nolo contendre* "to a felony or any crime involving moral turpitude, prostitution, obscenity or any crime of a sexual nature in any jurisdiction within the five (5) years immediately preceding the date of the

application." *Ellwest*, 718 F. Supp. at 1568 (quoting Section 5(a)(1)(ii) of Metropolitan ordinance (Bill No. 086-1549)).[16] In contrast, Chapters 6.54.050(B)(2) and 6.54.080(A)(2) limit the crimes for which an application may be denied to convictions of felonies or misdemeanors for crimes of a sexual nature. Plaintiffs' exhibit 5. Accordingly, the Court finds that the precise issue in this case was not litigated in *Ellwest* and that the defendants are not collaterally estopped from litigating the constitutionality of the civil disabilities provision in Chapter 6.54. *N.A.A.C.P., Detroit Branch*, 821 F.2d at 330.

3. *prior restraint*

The plaintiffs challenge the civil disabilities provision of Chapter 6.54 as an impermissible prior restraint on protected expression. They argue that the government cannot preclude a person or his employer from obtaining a license or permit to engage in constitutionally protected expression based on the fact that the person was previously convicted of obscenity.

Although laws may validly prohibit certain types of expression not protected, by the First Amendment, a prior restraint on the exercise of First Amendment rights is "the

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[16] This provision was found to be unconstitutional because it was not narrowly tailored to serve the government's interest in denying applications to those who were likely to operate their business in contravention of the ordinance. *Ellwest*, 718 F. Supp. at 1568. The Court reasoned that if the disclosure requirement had been limited to "such crimes as prostitution," rather than to any felony, there may have been a "reasonable inference that the applicant would be more likely to operate an adult-oriented establishment in contravention of the ordinance." *Id.*

most serious and least tolerable infringement on First Amendment rights." *Nebraska Press, Ass'n v. Stewart*, 427 U.S. 539, 559, 96 S.Ct. 2781, 2803, 49 L.Ed.2d 683, 697 (1975). Accordingly, "'[*any* system of prior restraints of expression [bears] a heavy presumption against its constitutional validity.'" *Vance v. Universal Amusement Co., Inc.*, 445 U.S. 308, 317, 100 S.Ct. 1156, 1162, 63 L.Ed.2 413, 421 (1980) (quoting *Bantam Books*, 372 U.S. at 70, 83 S.Ct., at 639, 9 L.Ed.2d. at 593 (emphasis in original) (citations omitted)). Prior restraints against expression protected by the First Amendment are disfavored because "[i]t is difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Vance*, 445 U.S. at 315 n.13, 100 S.Ct. at 1161 n.13, 63 L.Ed.2d at 420 n.13 (citations omitted).

In *City of Paducah v. Investment Entertainment*, 791 F.2d 463 (6th Cir. 1986), *cert. denied*, 479 U.S. 915, 107 S.Ct. 316, 93 L.Ed.2d 290 (1986), the Sixth Circuit considered the constitutionality of a nuisance abatement law which required the business license of distributors and exhibitors of adult oriented materials to be revoked if it was judicially determined that they had distributed obscene materials. The Court found that if:

> the abatement procedure focuses on regulating the future speech of a defendant who has been adjudged "guilty" of distributing obscene material, the law is tantamount to a licensing statute establishing a prior restraint of the defendant's first amendment right to engage in nonobscene expression. To use the language of *Near v. Minnesota*, a nuisance abatement procedure applied to obscenity should be upheld if "[t]he object of

> the [procedure] is punishment, in the ordinary sense, [rather than] suppression of the offending [business]" and if the procedure does not "operat[e] to . . . put the publisher under an effective censorship." 283 U.S. at 709-12, 51 S.Ct. at 628-30.

City of Paducah, 791 F.2d at 469. The Court went on to find that the ordinance was an impermissible prior restraint because it went "beyond merely deterring or punishing individuals who deal in obscene materials . . . to control [their] future expression." *Id.* at 470.

The Sixth Circuit further noted that the Supreme Court has permitted prior restraints provided that the following procedural safeguards are in place to prevent the prior restraints from causing censorship:

> the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a specified brief period of time and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured.

Id. (quoting *Southeastern Promotions. Ltd. v. Conrad*, 402 U.S. 546, 560, 95 S.Ct. 1239, 1247, 43 L.Ed.2d 448, 460 (1975)).

In *City of Paducah*, the Sixth Circuit found that there were adequate safeguards within Paducah's nuisance abatement ordinance. *Id.* Nevertheless, the Court found that the ordinance was unconstitutional because it "would still operate as a prior restraint on plaintiff's future distribution of non-obscene materials." *Id.*

Based on the Sixth Circuit's conclusion in *City of Paducah*, the Court finds that, because Chapter 6.54 requires the sexually oriented licensing board to deny applicants a license or permit based on a prior conviction of obscenity, the civil disabilities provision of the ordinance is an unconstitutional prior restraint. Accordingly, the Court finds that there is a substantial likelihood that the plaintiffs will succeed on the merits of their challenge to the civil disabilities provision of the ordinance.[17]

The defendants cite *Ino Ino Inc. v. City of Bellevue*, 937 P.2d 154 (Wash. 1997), and *DLS*, 107 F.3d 403 (6th Cir. 1997), in support of the constitutionality of the civil disabilities provision. However, the Court finds that these cases do not support the constitutionality of the civil disabilities provision in Chapter 6.54.

In *Ino Ino*, the plaintiffs challenged a similar civil disabilities provision only as a violation of the applicant's right to privacy. *Ino Ino*, 937 P.2d at 167-68. Accordingly, the Court does not find the decision in *Ino Ino* to uphold the civil disabilities provision in that case to be instructive. In *DLS*, the Sixth Circuit upheld a similar civil disabilities provision in a Chattanooga ordinance regulating sexually oriented businesses. The civil disabilities provision in that case prohibited an applicant from receiving a license or permit if the applicant had been convicted

[17] In *Ellwest*, this Court noted that "the practice of denying a person a license to engage in activities protected by the First Amendment based on prior convictions is constitutionally suspect. In particular, the courts have consistently struck down ordinances which permit or require the denial or revocation of a license to show adult-oriented motion pictures on the basis that an applicant or an employee of an applicant has been convicted of obscenity." *Ellwest*, 718 F. Supp. at 1572 n.5 (citations omitted).

of or pleaded *nolo contendre* to "a felony or any crime involving moral turpitude, prostitution, obscenity, or other crime of a sexual nature." *DLS*, 107 F.3d at 414. The plaintiffs "only argument" against the civil disabilities provision of the Chattanooga ordinance was "the fact that they were not enforced against the productions of *Hair* or *Oh! Calcutta!* demonstrates that they vest the City with unbridled discretion to award or deny licenses or permits." *Id.* Accordingly, the Sixth Circuit did not address whether it was permissible to deny a person license to engage in expression protected by the First Amendment because they had a previous conviction for obscenity. Therefore, the Court does not find the Sixth Circuit's decision to uphold the civil disabilities provision in that case to be determinative on the facts in this litigation.

B. Disclosure of Personal Information

The plaintiffs next challenge the provisions of Chapter 6.54 requiring that applicants disclose certain personal information. The plaintiffs challenge the requirement in Chapter 6.54.040(A)(5)(c) and 6.54.070(A)(4)(c) that applicants disclose their residential addresses for the past three years, the requirements in Chapter 6.54.040(A)(5)(g) and 6.54.070(A)(4)(g) that applicants submit their fingerprints and two portrait photographs, and the requirement in Chapter 6.54.070(A)(4)(d) that applicants disclose their "height, weight, color of eyes, and hair." Plaintiffs' exhibit 5.

The government contends, and the ordinance states, that applicants are required to comply with these provisions "for the purpose of facilitating the police investigation into the applicant's criminal background." Plaintiffs' exhibit

5, Chapter 6.54.040(A)(5)(c) & (g), 6.54.070(A)(4)(c), (g) & (d).

In light of the fact that the Court has found the plaintiffs are likely to be successful on their challenge to the civil disabilities provision of the ordinance, the Court further finds that it is also likely that the plaintiffs will be successful on their challenge to the disclosure requirements, as the only purpose for their inclusion in the ordinance is to facilitate the civil disabilities provision.[18]

C. Fee Requirements

Chapter 6.54.090 imposes a $500 fee on applications for a license and a $100 fee for applications for a permit. The plaintiffs challenge the constitutionality of these fees by asserting that they are excessive and are unconstitutional insofar as they are imposed to facilitate portions of the application process the Court has concluded will likely be found unconstitutional. The defendants contend that the fees are narrowly tailored to facilitate the administration of the ordinance and are, therefore, not excessive.

It is well established that the government may not tax the exercise of a constitutionally protected right. *Northeast Ohio Coalition for the Homeless v. City of Cleveland*, 105 F.3d 1107, 1109 (6th Cir. 1997). However, "an ordinance requiring a person to pay a license or permit fee before he can engage in a constitutionally protected activity does not

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[18] Moreover, at the hearing on the plaintiffs' motions, Captain Judith D. Bawcum, an officer with the Metropolitan Police Department, testified that in order to run a criminal background check, the police use the person's name and date of birth, and that they sometimes also use a fingerprint if the person goes to the police station.

violate the Constitution so long as the purpose of charging the fee is limited to defraying expenses incurred in furtherance of a legitimate state interest." *Id.* at 1109-1110. Such a fee is not excessive, even if it is more than nominal, so long as it is "'reasonably related to the expenses incident to the administration of the Ordinance.'" *Id.* at 1110 (quoting *Stonewall Union v. City of Columbus*, 931 F.2d 1130, 1136 (6th Cir. 1991)).

The deposition testimony of Mr. Terry Cobb, Director of the Codes Department of Metropolitan Nashville Davidson County, established that the direct costs of processing permits for entertainers is $43, which includes: (1) $24 for the criminal background check; (2) $9 for fingerprinting; and (3) $10 for a photo identification. Brief (Docket Entry No. 84) in support of plaintiffs' second motion for preliminary injunction, attachment, exhibit W at 24-25. The direct costs of processing individual license applications is $33, which includes: (1) $24 for the criminal background check; and (2) $9 for fingerprinting. *Id.*

In light of the fact that the Court has found that the civil disabilities provision of Chapter 6.54 is likely to be found unconstitutional, the Court further finds that, insofar as the fees charged under Chapter 6.54.090 are for the administration of the civil disabilities provision, there is a substantial likelihood that the plaintiffs will also succeed on their challenge of the fee provision.

D. Three-Foot Buffer Zone

Chapter 6.54.140(C) also provides that "[a]ll performances . . . shall only occur upon a stage at least eighteen inches above the immediate floor level and removed at least three feet from the nearest customer." Plaintiffs'

exhibit 5. The plaintiffs contend that this provision violates the *O'Brien* test because it is content-specific and not narrowly tailored to serve the government's interest. The plaintiffs also contend that the buffer zone is vague because it does not indicate how three feet is to be measured. Finally, the plaintiffs contend that the buffer zone violates the First Amendment rights of customers and entertainers to freedom of association.

1. *content-neutral*

In the plaintiffs' view, the distance requirement is an attempt to ban dances, such as table or couch dances, that allow entertainers to convey a message of intimacy and eroticism through their proximity to the customer. Therefore, the plaintiffs contend that the buffer zone is a content-specific regulation and should be reviewed under strict scrutiny.[19]

The Court has found that the ordinance, including the buffer zone provision, was written primarily to combat the secondary effects of adult entertainment and is not subject

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[19] In support of their contention that distance is a central part of the expressive content of erotic dances, the plaintiffs presented the expert testimony of Dr. Judith Lynne Hanna, a cultural anthropologist who studies messages conveyed by dance. Dr. Hanna testified that proximity is an integral component of erotic dance performances and conveys a message of intimacy. In addition, dancers testified at the hearing that in order to convey the message they intend with their performances, it is often important that they be able to whisper to the customer for whom they are performing. Dancers testified that if they are required to remain three feet from a customer, their ability to convey messages through such oral communication would be impossible because the loud music in the entertainment establishment would make whispers inaudible.

to strict scrutiny. *Richland Bookmart*, 137 F.3d at 439. Accordingly, the Court will treat the buffer zone as a content-neutral time, place or manner regulation.

2. *narrowly tailored*

The plaintiffs contend that the buffer zone is not narrowly tailored to serve the government's interest in preventing sexual contact between entertainers and patrons. The plaintiffs rely on *Schenck v. Pro-Choice Network*, 519 U.S. 357, 117 S.Ct. 855, 137 L.Ed. 1 (1997), in which the Supreme Court held that an injunction prohibiting abortion protesters from coming within 15 feet of people entering and leaving abortion clinics was unconstitutional because it "burdened more speech than necessary to serve the relevant governmental interest." *Id.*, 519 U.S. at 377, 117 S.Ct. at 867, 137 L.Ed.2d at 21. The Court's decision was based on the conclusion that, because the buffer zone floated around the people coming to and from the clinic, it would be difficult for protesters to remain in compliance with it and for courts to enforce it. Id., 519 U.S. at 379, 117 S.Ct. at 867, 137 L.Ed.2d at 21 and n.9. Additionally, the Court was concerned that due to the uncertainties caused by the fact that the zone floated, there was a substantial risk that more speech will be burdened than the injunction prohibits. *Id.*

Schenck is distinguishable from this case for several reasons. The buffer zone in this case differs from the one in *Schenck*, in that the buffer zone in *Schenck* was truly a floating buffer zone which surrounded the clinic visitors as they came and went from the clinic. Chapter 6.54, however, requires that during their performances, entertainers are to remain on a stage eighteen inches above the ground and three feet from the nearest customer. Consequently,

the three-foot buffer zone is fixed by the parameters of the stage, even though it may partially float around performers within those parameters.

The Court's decision in *Schenck* was also based on the conclusion that it prevented protestors from talking to clinic visitors at a normal conversational level. The plaintiffs contend that the three-foot buffer zone in this case suffers from the same problem because performers will not be able to carry on conversations with customers during performances from three feet due to the loud music in the entertainment establishments.

This problem differs from the one in *Schenck* because performers are not prevented from speaking to customers at a normal level entirely because of the three-foot distance requirement. Instead, as the plaintiffs admit, they are hampered due to the volume of the music in the entertainment establishments. The noise level is a factor completely under the control of the entertainment establishments and has no bearing on the constitutionality of the buffer zone.[20]

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[20] *Schenck* is also distinguishable for other reasons. First, the Supreme Court determined that the "'standard time, place, and manner analysis is not sufficiently rigorous' when it comes to evaluating content neutral injunctions that restrict speech." *Schenck*, 519 U.S. at 385, 117 S.Ct. at 857, 137 L.Ed.2d at 17 (quoting *Madsen v. Women's Health Ctr. Inc.*, 512 U.S. 753, 765, 114 S.Ct. 2516, 2519, 129 L.Ed.2d 593, 593 (1994)). Second, the Court was concerned with political speech that "lie[s] at the heart of the First Amendment." *Schenck*, 519 U.S. at 358, 117 S.Ct. at 858, 137 L.Ed.2d at 21. Erotic expression, on the other hand, falls within the "outer parameters of the First Amendment." *Barns*, 501 U.S. at 566, 111 S.Ct. at 2460, 115 L.Ed.2d at 511. Finally, the sidewalks in *Schenck* were the "prototypical example of a traditional public forum," and adult entertainment establishments are not. *Schenck*, 519 U.S. at 358, 117 U.S. at 858, 137 L.Ed.2d at 21 (citations omitted).

Accordingly, the Court finds that the Supreme Court's decision in *Schenck* that the buffer zone violated the protestor's free speech rights is not determinative with respect to the constitutionality of the buffer zone in Chapter 6.54.

The plaintiffs also argue that the same interest may be accomplished without the buffer zone through the prohibitions on sexual contact, caressing, fondling, or touching found in Chapter 6.54.140(A) and (B). A content-neutral regulation of expression designed to combat secondary effects such as the buffer zone in this case is not invalid because there is an "imaginable alternative that might be less burdensome on speech." *Ward,* 491 U.S. at 797, 109 S.Ct. at 2757, 105 L.Ed.2d at 679. Instead, if the regulation is not "substantially broader than necessary to achieve the government's interest," it will be upheld. *Id.* at 800, 109 S.Ct. at 2757, 105 L.Ed.2d at 681. In *DLS,* the Sixth Circuit determined that a six-foot buffer zone between patrons and entertainers in adult entertainment establishments was narrowly tailored to serve the city's interest in preventing contact between customers and entertainers, and thereby prevent crime and disease. *DLS,* 107 F.3d at 413. Noting that the buffer zone "will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative," such as a no-touch rule, the Sixth Circuit found that the buffer zone was narrowly tailored. *Id.* at 412 (citing *Ward,* 491 U.S. at 800, 109 S.Ct. at 2757-58, 105 L.Ed.2d at 681.).

Likewise, the Court finds that even though Chapter 6.54.140(A) and (B) prohibit sexual contact, caressing, fondling and touching, the three-foot buffer zone is narrowly tailored to serve the government's interest in

preventing crime and sexual contact between entertainers and patrons. Accordingly, the Court finds that the plaintiffs are not likely to succeed in their challenge to Chapter 6.54.140(C) on the basis that the buffer zone is not narrowly tailored to serve the government's interest.

3. *economic impact*

The plaintiffs next contend that the buffer zone is unconstitutional because of the severity of the economic impact it will have upon adult entertainment establishments. Because of this impact, the plaintiffs contend that the erotic expression is, in effect, being driven from the marketplace of ideas in violation of the First Amendment.

In *DLS,* the Sixth Circuit considered whether the economic impact of ordinances regulating adult entertainment renders such ordinances unconstitutional under the First Amendment. *DLS,* 107 F.3d at 413. The Court found that if an ordinance were to "destroy the market for adult cabarets, it might run afoul of the First Amendment, but not merely if it had adverse effects on the individual theater." *Id.* (citation omitted). Consequently, the economic impact on individual establishments does not raise First Amendment concerns. The appropriate inquiry is whether the economic impact of an ordinance in the aggregate forecloses a "reasonable opportunity" to operate an adult cabaret. *Id.* (citing *Renton,* 475 U.S. at 54, 106 S.Ct. at 932, 819 L.Ed.2d at 42).

Deja Vu presented evidence that, because of the configuration of seats and stages in its Nashville club and Ken's Gold Club, a majority of the floor space in these establishments will not be useable for the seating of customers if the three-foot buffer zone is in effect.

The Court finds that this evidence only establishes that the ordinance will impose a hardship of an undeterminable degree upon an undeterminable number of cabarets. It does not establish that the buffer zone forecloses a reasonable opportunity to open and operate a cabaret in Nashville. The plaintiffs did not present any evidence that the ordinance will destroy the market for adult cabarets. Nor did the plaintiffs present evidence that a three-foot buffer zone had been responsible for the closing of any adult cabaret in other areas.[21]

The plaintiffs have failed to present sufficient evidence to establish that the buffer zone would foreclose reasonable opportunities to open and operate adult cabarets. Accordingly, the Court finds that the plaintiffs are not likely to succeed on the merits of their challenge to Chapter 6.54.140(C) on the basis that the economic impact of the buffer zone causes it to be unconstitutional.

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[21] At the hearing on the plaintiffs' motions (Docket Entry Nos. 81 and 83), the plaintiffs presented the testimony of Mr. Paul Bern in an attempt to establish that the application of a three-foot buffer zone would destroy the economic viability of adult cabarets in Nashville. Mr. Bern testified that the imposition of a four-foot buffer zone in adult cabarets in Washington State caused one profitable cabaret to become unprofitable. The Court finds that this testimony does not establish that Chapter 6.54 will prevent adult cabarets in Nashville from being viable. First, Mr. Bern only testified to the effect of the Washington ordinance on one cabaret. Moreover, Mr. Bern did not testify that any adult cabarets had closed in Washington. Additionally, the Washington ordinance contained other restrictions in addition to the buffer zone, including a lighting requirement, that could have caused the negative impact on the cabaret. *See Ino Ino, Inc. v. City of Bellevieu*, 937 P.2d 154, 171 (Wash. 1997). Accordingly, the Court finds that this evidence does not establish a likelihood of a similar effect due to the three-foot buffer zone in Chapter 6.54.

4. *freedom of association*

The plaintiffs contend that when an entertainer performs for a customer, they are engaging in private or intimate association and expressive association protected by the First Amendment which will be hampered by the buffer zone. Accordingly, the plaintiffs contend that the constitutionality of the buffer zone should be reviewed under strict scrutiny.

Our First Amendment jurisprudence has recognized private or intimate association and expressive association:

> In one line of decisions, the Court has concluded that choices to enter into and maintain certain intimate human relationships must be secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme. In this respect, freedom of association receives protection as a fundamental element of personal liberty. In another set of decisions, the Court has recognized a right to associate for the purpose of engaging in those activities protected by the First Amendment – speech, assembly, petition for the redress of grievances, and the exercise of religion.

Dallas v. Stanglin, 490 U.S. 19, 24, 109 S.Ct. 1591, 1594, 104 L.Ed.2d 18, 25 (1989) (quoting *Roberts v. United States Jaycees*, 468 U.S. 609, 617-18, 104 S.Ct. 3244, 3249, 82 L.Ed.2d 462, 471 (1984)). Those relationships that presuppose "deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life" are protected by the First Amendment as intimate

relationships. *Roberts,* 468 U.S. at 619-620, 104 S.Ct. at 3250, 82 L.Ed.2d. at 472. In order to determine whether a relationship may be protected under the First Amendment as intimate association, the Court may look at such factors as the number of people in the relationship, its purpose, policies, selectivity, and congeniality, as well as other relevant characteristics. *Id..*, 468 U.S. at 620, 104 S.Ct. at 3251, 82 L.Ed.2d at 472-73. Expressive association is protected to ensure that individuals who are pursuing the same or similar "political, social, economic, educational, religious, and cultural ends" may associate with each other. *Id.*, 468 U.S. at 622, 104 S.Ct. at 3252, 82 L.Ed.2d. at 472.

With respect to whether the contact between entertainers in adult cabarets and customers rises to the level of intimate association, performers entertain individuals who are willing to pay admission to the cabaret and a tip. Therefore, the association is not selective. Additionally, the customers generally view performances in the presence of all the other customers rather that in secluded areas. Therefore, even though the contact may be sexual in nature, it is not intimate. Accordingly, the Court finds that the association between entertainers and customers does not rise to the level of intimate association protected by the First Amendment.

With respect to whether the entertainment rises to the level of expressive association protected by the First Amendment, the Court finds that the entertainers and customers in adult entertainment establishments do not associate in order to pursue "political, social, economic, educational, religious, and cultural ends." *Roberts,* 468 U.S. at 622, 104 S.Ct. at 3252, 82 L.Ed.2d. at 474. Accordingly, the Court finds that the association between entertainers

and customers does not rise to the level of expressive association protected by the First Amendment.

As the Court has determined that customers and entertainers are not engaged in either intimate or expressive association, the Court finds that the plaintiffs are not likely to succeed on the merits of their challenge to Chapter 6.54.140(C) on the basis that the buffer zone impermissibly interferes with their First Amendment right to freedom of expression.

5. *vagueness*

Finally, the plaintiffs contend that the buffer zone is impermissibly vague because it fails to provide any guidance as to how the three-foot distance requirement is to be measured.[22] The defendants contend that there is not a substantial likelihood that the plaintiffs will be successful in their vagueness claim because in *DLS*, 107 F.3d at 411, the Sixth Circuit upheld an ordinance establishing a similar six-foot buffer zone. The defendants further contend that the ordinance is not vague because "three feet" is a common and understandable term.

The Court finds that the Sixth Circuit's holding in *DLS* that a six-foot buffer zone was constitutional is not indicative of the plaintiffs' likelihood of success on the merits as the plaintiffs in *DLS* failed to challenge the buffer zone provision in that case as unconstitutionally

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[22] At the hearing on the plaintiffs' motions, the plaintiffs demonstrated that whether the measurement is taken from the place where the nearest customer is standing or from the place where the nearest customer could reach may determine whether the customer will be able to hand the entertainer money while she is on stage performing.

vague. Based on the "words of the ordinance itself," the Court agrees that the ordinance does not provide any guidance with, respect to how three feet is to be measured. *Grayned*, 408 U.S. at 110, 92 S.Ct. at 2300, 33 L.Ed.2d at 228. As for "the interpretation of the [ordinance] given by those charged with enforcing it," Charles Watkins, the Sexually Oriented Business Inspector, testified during the hearing of the plaintiffs' motions that he was did not know how three feet would be measured. *Id.*

However, in determining whether a law regulating expressive activity is vague, courts do not require "perfect clarity and precise guidance." *Ward*, 491 U.S. at 794, 108 S.Ct. at 2755, 105 L.Ed.2d at 677 (citing *Grayned*, 408 U.S. at 110, 92 S.Ct. at 2300, 33 L.Ed.2d at 228-229 for the proposition that "we can never expect mathematical certainty in our language."). Although the standard for measuring three feet is "undoubtedly flexible, and the officials implementing [it] will exercise considerable discretion," the Court finds that the buffer zone is not unconstitutionally vague. *Id.* Accordingly, the Court finds that the plaintiffs are not likely to succeed on the merits of their challenge to Chapter 6.54.140(C) on the basis that the buffer zone is impermissibly vague.

E. Prohibition Against Physical Contact

Chapter 6.54.140(C) states that "[n]o customer shall be permitted to have any physical contact with any entertainer on the licensed premises while the entertainer is engaged in a performance of live sexually oriented entertainment." Plaintiffs' exhibit 5. The plaintiffs challenge this provision as overbroad because it prohibits incidental,

unintentional, benign, or non-sexual contact between customers and entertainers.

In support of this assertion, the plaintiffs cite *Threesome Entertainment v. Strittmather*, 4 F. Supp. 719, 722-23 (N.D. Ohio 1988). In *Strittmather*, a similar no-touch provision was found to be unconstitutional because it lacked a mens rea requirement. However, the prohibition against touching in that case is distinguishable from the no-touch provision in Chapter 6.54 in that it provides criminal penalties.

Moreover, in order to be considered overbroad, a law must substantially threaten the exercise of First Amendment rights. *Ferber*, 458 U.S. at 770, 102 S.Ct. at 3361, 73 L.Ed.2d at 1131. However, even if dancers remain a greater distance from customers while performing than they might if the law prohibited only intentional touching, the increased distance will not substantially threaten the exercise of their First Amendment right by significantly changing the message of their performance. *See KEV, Inc. v. Kitsap County*, 793 F.3d 1053, 1061 (1986). Furthermore, the Court finds that performances are unlikely to be affected by the no-touch provision in light of the fact that the performers are required to remain three feet from the nearest customer while performing under the buffer zone provision in the ordinance. Accordingly, the Court finds that there is not a substantial likelihood that the plaintiffs will be successful on their overbreath challenge of the no-touch provision in Chapter 6.54.140(C).

F. Hours of Operation

Chapter 6.54.120(A) requires that "[a]ll sexually oriented businesses shall be closed between the hours of

three a.m. and. eight a.m. Monday through Saturday and between the hours of three a.m. and twelve noon on Sundays." Plaintiffs' exhibit 5. The plaintiffs contend that this provision does not further a substantial government interest, and therefore, fails the second prong of the *O'Brien* test. *Barnes*, 501 U.S. at 567, 111 S.Ct. at 2460, 115 L.Ed. 2d at 512. The plaintiffs further contend that because this restriction only applies to businesses protected by the First Amendment, it violates the Equal Protection Clause of the Fourteenth Amendment. The defendants contend that the Court should deny the plaintiffs' motion with respect to this challenge because the same restriction was upheld by this Court in *Ellwest*, 718 F. Supp. at 1577, and a similar restriction was upheld by the Sixth Circuit in *Richland Bookman*, 137 F.3d at 43.

The Court has found that reducing crime and the spread of sexually transmitted diseases is an important or substantial government interest. The preamble to Chapter 6.54 does not contain any information distinguishing the early morning hours from other hours with respect to the secondary effects of adult entertainment establishments. However, "[i]t is not unreasonable to believe that such regulation of hours of [adult entertainment establishments] would tend to deter prostitution" and other crimes. *Richland Bookmart*, 137 F.3d at 440-41. Moreover, adult entertainment establishments are only required to close 5 hours a day on weekdays and nine hours on Sunday. This is a minor infringement upon activity protected by the First Amendment. *Ellwest*, 718 F. Supp. at 1577. Accordingly, the Court finds that the hours of operation restriction is a valid time, place, or manner regulation.

In support of the plaintiffs' challenge under the Equal Protection Clause of the Fourteenth Amendment, the

plaintiffs contend that patrons of adult entertainment establishments have a fundamental right to visit adult establishments during the hours the ordinance requires those establishments to be closed. Therefore, the plaintiffs argue that the Court should review the constitutionality of the hours of operation provision under strict scrutiny.

Heightened scrutiny is not the appropriate level of scrutiny for regulations challenged as violating the Equal Protection Clause unless a government regulation utilizes "a classification [that] warrants some form of heightened review because it jeopardizes [the] exercise of a fundamental right or categorizes on the basis of an inherently suspect characteristic." *Nordlinger v. Hahn*, 505 U.S. 1, 10, 112 S.Ct. 2326, 2331, 120 L.Ed.2d 1, 12 (1992). If not, "the Equal Protection Clause requires only that the classification rationally further a legitimate state interest." *Id.*

The Court finds that there is no fundamental interest in attending adult entertainment establishments during the hours in which the ordinance requires them to be closed. Nor does the hours of operation provision categorize patrons of adult entertainment establishments or adult entertainments on the basis of an "inherently suspect characteristic." *Id.* Accordingly, review of the hours of operation provision under heightened scrutiny is not appropriate based on the plaintiffs' challenge. The Court has found that the hours of operation provision furthers an important or substantial government interest. Therefore, the hours of operation provision is also rationally related to a legitimate state interest. Accordingly, the Court finds that the plaintiffs are not likely to succeed on

their challenges to Chapter 6.54.120(A) as an unconstitutional regulation under the First Amendment or Equal Protection Clause of the Fourteenth Amendment.

G. Definitions

1. *sexually oriented*

Chapter 6.54.010(X) defines "sexually oriented" as:

> any exhibition of any motion pictures, films or videos depicting "specified sexual activities" or "specified anatomical areas" or any live performance, display or dance of any type, removal of articles of clothing or appearing unclothed, pantomime, modeling, or any other personal service offered customers a significant or substantial portion of which depicts any actual or simulated performance of "specified sexual activities" or exhibition and viewing of "specified anatomical areas."[23]

Plaintiffs' exhibit 5.

The plaintiffs contend that this definition is vague and overbroad as it potentially applies to a vast range of

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[23] Chapter 6.54.010(BB) defines "specified sexual activities" as: "(1) human genitals in a state of sexual stimulation or arousal; (2) acts of human masturbation, sexual intercourse, or sodomy; (3) fondling or erotic touching of human genitals, pubic region, buttock, or female breasts." Chapter 6.54.101(AA) defines "specified anatomical areas" as "(1) less than completely and opaquely covered: a. human genitals, pubic region, b. buttocks, c. female breasts below a point immediately above the top of the areola; and (2) human male genitals in a discernibly turgid state, even if completely opaquely covered." Plaintiffs' exhibit 5.

expression and entertainment that do not cause the type of secondary effects at which the ordinance is aimed.

The Court agrees that the term "sexually oriented" is overbroad as it could apply to the exhibition of any film, video, or movie, even if it were not the type typically considered to be adult oriented, providing that it depicts "[l]ess than completely and opaquely covered" buttocks or female breasts as stated in Chapter 6.54.010(AA). Therefore, this definition does not limit sexually oriented films, videos, or movies to those which are distinguished by their emphasis on such depictions. Under this definition, PG or R-rated movies containing such depictions could also fall within the purview of the statute despite the fact that they are not the type of movies that cause the kind of secondary effects at which Chapter 6.54 is aimed. Consequently, the definition of "sexually oriented" "reaches a substantial number of impermissible applications. *Ferber*, 458 U.S. at 771, 102 S.Ct. at 3362, 73 L.Ed.2d. at 1132. Accordingly, the Court finds that the plaintiffs are likely to succeed on their overbreath challenge to the definition of "sexually oriented" in Chapter 6.54.010(X).

2. *sexually oriented bookstore and sexually oriented video store*

A. "sexually oriented bookstore" is defined in Chapter 6.54.010(Y)(1) as:

> an establishment having a *majority of its stock in trade or a majority of its floor space* in books, magazines, other periodicals, or any other items which are *distinguished or characterized by their emphasis* on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for

> observation of the patrons therein; or in conjunction therewith has facilities for the presentation of sexually oriented entertainment, including but not limited to sexually oriented movies, sexually oriented videos, sexually oriented films, or sexually oriented live entertainment, for observation by patrons therein.

Plaintiffs' exhibit 5 (emphasis added).

Chapter 6.54.010(Y)(4) defines sexually "oriented video store" as:

> a commercial establishment having *a majority of its stock or a majority of its floor space* dedicated to "sexually oriented videos," as defined in this section, which are rented or sold or presented for a fee or incidentally to another service; or in conjunction therewith, regularly presents on the premises sexually oriented motion pictures or sexually oriented films, "sexually oriented videos," or sexually oriented live exhibitions which are *distinguished or characterized by an emphasis* on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observance by patrons therein.

Id. (emphasis added).

The plaintiffs assert that these definitions are unconstitutionally vague because the phrase "majority of stock" and "majority of its floor space" is vague.

In *Richland Bookmart*, the Sixth Circuit considered a vagueness challenge to a regulation of sexually oriented bookstores that defined the bookstores as those having their "principal or predominant stock or trade" in sexually oriented materials, devices or paraphernalia. *Richland*

Bookmart, 137 F.3d at 441. The Court rejected this challenge, finding that terms used in the definition were "understandable common terms." *Id.*

Likewise, the Court finds that the terms "majority of stock" and "majority of its floor space" are sufficiently clear to provide notice to bookstores and video stores that fall within the purview of the ordinance. Accordingly, the Court finds that the plaintiffs are not likely to succeed on their vagueness challenge to the definitions of "sexually oriented bookstore" and "sexually oriented video store."

The plaintiffs also challenge these definitions as overbroad. In order to fall under the definition of a "sexually oriented bookstore," a store must have a majority of its stock in materials "distinguished or characterized by their emphasis on matter depicting, describing or relating to 'specified sexual activities' or 'specified anatomical areas.'" Chapter 6.54.010(Y). Additionally, in order to fall under the definition of a "sexually oriented video store," a store must have a majority of its stock of floor space in "sexually oriented videos." Such videos are narrowly defined in Chapter 6.54.010(Y)(4)(a) as those with a cover that depicts "specified sexual activities" or "specified anatomical areas." Accordingly, the Court finds that the plaintiffs are not likely to succeed on their claim that the definitions of "sexually oriented bookstore" and "sexually oriented video store" are overbroad.

Chapter 6.54.010(Y)(2) defines "sexually oriented nightclub" to mean:

> a theater, concert hall, auditorium, nightclub, bar, restaurant, or similar commercial establishment which *regularly* features live performances that are *characterized* by any actual or

> simulated performance of "specified sexual activities" or the exposure of "specified anatomical areas," as defined in this section.

Plaintiffs' exhibit 5 (emphasis added).

Chapter 6.54.010(Y)(3) defines "sexually oriented theater" to mean:

> an enclosed building *regularly* used for presenting films, motion pictures, videocassettes, slides, or other photographic reproductions or other material *depicting, describing or relating* to "specified sexual activities" or "specified anatomical areas," as defined in this section, for observation by patrons therein.

Id. (emphasis added).

Chapter 6.54.010(Z) defines "sexually oriented entertainment" to mean:

> the *regular* presentation, for a fee or incidentally [sic] to another service, of material or exhibitions *distinguished or characterized by an emphasis* on matter depicting or relating to "specified sexual activities" or "specified anatomical areas" as defined in this section for observation by patrons therein.

Id. (emphasis added).

The plaintiffs contend that the definitions of "sexually oriented nightclub," "sexually oriented theater," and "sexually oriented entertainment," are impermissibly vague in that there is no limitation on the scope of the interpretation of the term "regularly" featured, used, or presented.

The Court finds that there is no "real and substantial ambiguity" in the term "regular." *Bastiardanes v. City of Galveston,* 682 F.2d 1203, 1210 (5th Cir. 1982) (denying the plaintiff's vagueness challenge to a city zoning ordinance which restricted the operation of adult theaters on the basis that it was unclear what it meant to show adult films on a "regular basis"). In the case of *FW/PBS*, an ordinance regulated adult theaters and cabarets that regularly provided nudity, sexually explicit depictions, or descriptions. *FW/PBS,* 493 U.S. at 254, 110 S.Ct. at 619-20, 107 L.Ed.2d at 636-37. The plaintiffs challenged the term "regularly" as vague. Justice Scalia concluded that the term "regularly" in this context "can reasonably be interpreted to mean a continuous presentation of the sexual material as one of the very objectives of the commercial enterprise." *Id.,* (Scalia, J., concurring in part and dissenting in part). The same is true with respect to the term "regularly" as it is used in Chapter 6.54. Accordingly, the Court finds that the plaintiffs are not likely to succeed on their challenge to the terms "sexually oriented nightclub," "sexually oriented theater," and "sexually oriented entertainment" on the basis that the term "regularly" is vague.

Further, the plaintiffs contend that as the terms "sexually oriented nightclubs," "sexually oriented entertainment" and "sexually oriented theater" are overbroad as they are defined in the ordinance. The Court finds that, because the terms "sexually oriented nightclubs" and "sexually oriented entertainment" are limited to those that have regular presentations or performances characterized or distinguished by the inclusion of "specified sexual activities" or the exposure of "specified anatomical areas,"

the plaintiffs are not likely to succeed on their challenge that these definitions are overbroad.

However, the definition of "sexually oriented theater" could include those theaters which regularly present films, motion pictures, and videocassettes which merely depict "specified sexual activities" or, "specified anatomical areas." It does not limit the theaters to those that show films, motions pictures, and videocassettes that are distinguished or characterized by such depictions. Consequently, this definition includes a vast number of theaters which show, for instance, PG or R-rated movies containing such depictions, but which would not cause the kinds of secondary effects at which Chapter 6.54 is aimed. Therefore, the definition of "sexually oriented theater" "reaches a substantial number of impermissible applications." *Ferber,* 458 U.S. at 771, 102 S.Ct. at 3362, 73 L.Ed.2d at 1132. Accordingly, the plaintiffs are likely to succeed on their overbreath challenge to the definition of "sexually oriented theater" in Chapter 6.54.010(Y)(2).

H. Booth Regulation

Chapter 6.54.050 of the ordinance sets forth certain construction standards and regulatory provisions concerning any "booth" for the "viewing of any sexually oriented entertainment, including but not limited to sexually oriented films, sexually oriented movies, sexually oriented videos." Plaintiffs' exhibit 5. The plaintiffs contend that the booth regulations are overbroad because they apply to businesses and forms of entertainment that do not cause the types of secondary effects at which Chapter 6.54 is aimed.

The term "sexually oriented video" has been narrowly defined as those that depict specified sexually activities or specified anatomical areas on its cover. Therefore, the definition of "sexually oriented video" does not reach a "substantial number of impermissible applications." *Ferber*, 458 U.S. at 771, 102 S.Ct. at 3362, 73 L.Ed.2d at 1132. As set forth above, the term "sexually oriented" is substantially overbroad as it applies to films and movies. However, the plaintiffs have not established that there are a substantial number of circumstances in which films and movies to which the term "sexually oriented" impermissibly applies are shown in the types of booths that Chapter 6.54 seeks to regulate. Therefore, the plaintiffs have not established that the booth requirement is overbroad because it "reaches a substantial number of impermissible applications." *Id.* Accordingly, the Court finds that the plaintiffs are not likely to succeed on their overbreath challenge to the booth requirements in Chapter 6.54.050.

I. Revocation and Suspension Provisions

Chapter 6.54.150(A)(9) states that the board shall revoke a license if "[t]he licensee fails to maintain the licensed premises in a sanitary and safe condition by allowing continuing violations of Chapter 6.54." Plaintiffs' exhibit 5. Chapter 6.54.150(B)(1) states that the board shall either fine, suspend or fine and suspend a license if "[t]he licensee fails to maintain the licensed premises in a sanitary and safe condition by allowing a violation of Chapter 6.54, Tennessee Code Annotated Section 57-4-204 or Metropolitan Code Section 7.24.030." *Id.*

The plaintiffs contend that this provision is impermissibly vague because it does not provide sufficient guidance

as to what constitutes a "sanitary and safe condition." The Court finds that in order for the board to revoke, suspend, and/or fine a licensee under these sections, the licensee must be in violation of Chapter 6.54, Metropolitan Code § 7.24.030, or Tennessee Code Annotated, § 57-4-204. Because the Metropolitan Code, § 7.24.030, Tennessee Code Annotated, § 57-4-204, and Chapter 6.54, all contain standards for determining whether a business is in compliance with them, the Court finds that the plaintiffs are not likely to succeed on their challenge to Chapters 6.54.150(A)(9) and 6.54.150(B)(1) as impermissibly vague.

J. Severability

Chapter 6.54.170 states:

> Should any court of competent jurisdiction declare any section, clause or provision of this chapter to be unconstitutional, or any other ordinance of the metropolitan government unconstitutional, such decision shall affect only such section, clause, provision or ordinance so declared unconstitutional, and shall not affect any other section, clause or provision of this chapter.

Plaintiffs' exhibit 5.

When legislation contains a severance clause, "[i]t is the duty of the courts to give effect to a severability clause and to make an elision, so as not to invalidate an entire act" "unless observance thereof would frustrate the dominant legislative intent." *Moore v. Fowinkle*, 512 F.2d 629, 632 (6th Cir. 1975) (citations omitted). Moreover, if severing the unconstitutional provisions of an act would cause it to be essentially meaningless, the Court should not give

effect to the severability clause. *Ellwest*, 718 F. Supp. at 1581.

IV.

As set forth above, the Court finds that the plaintiffs have made the required showing of a substantial likelihood of success on the merits that numerous provisions of Chapter 6.54 are unconstitutional as violations of the First or Fourteenth Amendments to the United States Constitution. If the Court were to give effect to the severability clause, the remaining provisions would frustrate the dominant legislative intent of the ordinance. Accordingly, a preliminary injunction will issue against the defendants. The defendants shall be enjoined from enforcing Chapter 6.54, in its entirety, pending the adjudication of these cases on the merits and entry of a final judgment.

An appropriate order shall be entered.

/s/ Thomas A. Higgins
Thomas A. Higgins
United States District Court
10-1-99

[UNITED STATES DISTRICT COURT]
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC. et al. v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,	No. 3:97-1066 Judge Nixon Magistrate Judge Griffin
and JERRY C. PENDERGRASS, et al., v. THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.	Consolidated Cases No. 3:97-1176 Judge Nixon Magistrate Judge Griffin

ORDER

(Entered Dec. 3, 1998)

Pending before the Court is Defendant's Motion to Dissolve Preliminary Injunction, (Doc. No. 34), to which Plaintiffs have filed a Response, (Doc. No. 63). Defendant, in turn, has filed a Reply to Plaintiffs' Response. (Doc. No. 67.) For the reasons set forth in the accompanying memorandum, Defendant's motion is GRANTED and the preliminary injunction imposed in this case is hereby DISSOLVED.

It is so ORDERED.

Entered this the 1st day of December, 1998.

/s/ John T. Nixon
JOHN T. NIXON,
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

[UNITED STATES DISTRICT COURT]
MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC. et al.,	
v.	
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,	No. 3:97-1066 Judge Nixon Magistrate Judge Griffin
and	Consolidated Cases
JERRY C. PENDERGRASS, et al.,	
v.	
THE METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.	No. 3:97-1176 Judge Nixon Magistrate Judge Griffin

MEMORANDUM

(Entered Dec. 3, 1998)

Pending before the Court is Defendant's Motion to Dissolve Preliminary Injunction, (Doc. No. 34), to which Plaintiffs have filed a Response, (Doc. No. 63).[1] Defendant, in turn, has filed a Reply to Plaintiffs' Response. (Doc. No. 67.) For the reasons, set forth below, Defendant's motion is

[1] Plaintiffs have filed both a Response (Doc. No. 63) and a Memorandum in support of their Response (Doc. No. 64). For the sake of brevity, the Court's citations to Plaintiffs' Response shall in actuality refer to Plaintiffs' Memorandum. (Doc. No. 64.)

GRANTED and the preliminary injunction imposed in this ease is hereby dissolved.

I. Background

This case revolves around Defendant Metropolitan Government of Nashville and Davidson County's (hereinafter Metro) Sexually Oriented Business Ordinance ("the Ordinance"). By Order dated December 8, 1997, this Court granted Plaintiffs' motion for a preliminary injunction based on the findings that the Ordinance as written did not sufficiently preserve the status quo, nor did it provide for sufficiently prompt judicial review. (Doc. No. 23.) Defendant has moved for the preliminary injunction to be dissolved now that the Ordinance has been amended, as has the State's writ of *certiorari* statute. (Def.'s Mem. at 2-3.) The Court held a hearing on November 5, 1998, during which time the parties had an opportunity to present evidence and argue their positions.

A. The Enjoined Ordinance

The Plaintiffs are a group of establishments and individuals which provide adult public entertainment in the form of live nude and/or semi-nude performance dance entertainment in a club environment. This Court enjoined a regulatory scheme enacted by the Metro Council which requires "sexually oriented businesses" to obtain licences before being permitted to operate and adult entertainers

employed in these establishments to obtain permits in order to perform.[2]

The Ordinance as originally written specifically requires the operators of all "sexually oriented businesses," including bookstores, video stores, theaters, and nightclubs which "regularly present[] material or exhibitions distinguished or characterized by an emphasis on matter depicting . . . 'specified sexual activities' or 'specified anatomical areas'" to obtain licenses to operate issued by a specially established board ("the Board"). Tenn. Code Ann. § 6.54.010(S). The application for a license requires the operators to provide such information as addresses, employment history, criminal violations of a sexual nature or involving moral turpitude, fingerprints, citations of zoning code violations, and diagrams of booths, stalls, and cubicles. §§ 6.54.040(A)(5)-(6), 6.54.070A)(2). Operators who have been convicted or pleaded *nolo contendere* to a crime of a sexual nature or involving moral turpitude are prohibited from obtaining licenses for specified periods of time. §§ 6.54.040(C)(2)(a)-(b), 6.54.070(A)(9). Similar requirements apply for entertainers employed in these businesses. Licenses must be renewed on a yearly basis, and can be revoked for a variety of reasons, including discovery that an operator employs an entertainer who does not have a permit, or the furnishing of sexually explicit material to minors. §§ 6.54.100, 6.54.140.

Once the application is received, the Board must distribute a copy of the application "promptly" to the

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[2] Again for the sake of brevity, the Court hereinafter will refer only to licenses sought by businesses since the issues at hand apply equally to license seekers as well as permit seekers.

Police Department, the Department of Codes and Administration, the Health Department, the Fire Department, and the applicant. § 6.54.040(A)(1). These departments are required to conduct inspections and to provide reports to the Board within thirty days of receipt of the application. § 6.54.040(B)(3). The Board is then required to make its determination within twenty days of receiving these reports. § 6.54.040(C)(1). However, in certain circumstances, the Board may hold the application for an additional thirty days before issuing its initial decision. § 6.54.040(C)(7).

The enjoined Ordinance makes provisions for the appeal of unfavorable decisions. In the case of both operators and entertainers, if the license is denied, the applicant has the right to request a hearing within ten days of notification of the decision. §§ 6.54.040(E)(1), 6.54.070(D)(6). Once the request is received, the Board is required to schedule a hearing at its next meeting, during which time it hears evidence presented by the applicant and issues its final decision.[3] The denial of a license is required to be mailed within ten days to the applicant's address. §§ 6.54.040(E)(1)(e), 6.54.070(D)(6)(e). An appeal of this decision may be made directly to the Chancery Court. §§ 6.54.040(E)(2), 6.54.070(D)(7). The metropolitan government department of law may institute proceedings for a declaratory judgment. In addition, the Ordinance permits an applicant to appeal by filing a petition for writ of certiorari, in which case the Board must submit all records of the proceedings before it to the court within ten days. *Id.* The enjoined Ordinance makes similar provisions

[3] The Board is required to meet twice a month. § 6.54.020(d)(1). Board Policy No. 10 dictates that the Board meet on the second and fourth Tuesdays of every month.

for the appeal of the denial of an entertainer's permit. However, in the case of entertainers, the board has only fifteen days to make its initial determination after receiving the reports from other agencies, although it may hold the application for an additional thirty days under specified circumstances. §§ 6.54.070(C)(1), (C)(5).

B. The Amended Ordinance

1. Maintenance of the Status Quo

The amended Ordinance allows currently operating businesses to appeal adverse administrative decisions within 60 days, during which time the adverse decision is stayed. Furthermore, once the appeals process is initiated, the adverse decision is further stayed until the court upholds the decision after adjudication on the merits. § 6.54.040(E)(3). If the business or entertainer forgoes appeal, they may continue to operate until the 60 day period has expired. *Id.* An identical provision applies to individual permit applications. § 6.54.070(D)(3).

2. Prompt Review

a. *Administrative Determinations*

The administrative process, as amended, will be completed in 47 days. (Def.'s Mem. at 4). Upon submission of application for a license, the Department of Codes Administration, the Fire Department, and the Health Department will inspect the business, and the police Department will run a criminal background check on the applicant. § 6.54.040(B)(1). All of these departments must submit reports to the Board within 20 days of the filing of the application. *Id.* Failure to investigate or submit a

timely report by any department will be construed as though the department approved the application. *Id.*

Once the Board has the reports, it must meet and deny or grant the application within 15 days. § 6.54.040(C)(1). Failure to meet or meeting without a quorum shall be treated as an approval of the application and the license will be mailed to the applicant. *Id.* If the Board meets on the 15th day and allowing one day to mail the result, the entire process will be complete in 47 days.[4] (Def.'s Mem. at 4.)

Upon denial of an application, the applicant can appeal to the Board for a full hearing or proceed to court. § 6.54.040(E)(1)-(2). The applicant has 5 days to appeal to the Board and the Board has 15 days to meet and hear the appeal. §6.54.040(E)(1)(a)-(b). An oral decision will be rendered at the hearing. § 6.54.040(E)(1)(d) Allowing one day to mail a written decision, the applicant may add an additional 21 days to the administrative process at his or her discretion.

b. *Judicial Review*

Applicants can apply for a writ of *certiorari* in order to have the final decision of the Board reviewed since a procedure for review is not otherwise provided. Tennessee Code Annotated § 27-9-111, addresses the briefing and hearing schedule used in processing writs. The section has been amended as follows:

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[4] Including a potential ten day extension for additional investigation into out-of-state records, if necessary. § 6.54.040(C)(8).

> If the final decision of a board or commission revokes, suspends, or denies a license or permit that is required prior to engaging in conduct protected by the First Amendment to the United States Constitution, and either the petitioner or the respondent requests an expedited hearing, *the court shall hear the matter and issue its decision within forty (40) days of the court granting the writ of certiorari.* When an expedited hearing is requested, the board or commission shall forward the transcript described in Tennessee Code Annotated, Section 27-9-109 within seven days of the grant of the writ of *certiorari*.

(Emphasis added.) The statute thus now requires a decision within a mandated period of time for all First Amendment cases.

II. Discussion

In order to determine the propriety of injunctive relief, the Court must look to the following factors: (1) the likelihood of the movant's success on the merits; (2) the irreparable harm that could result if the injunction is not issued; (3) the impact on the public interest of granting or denying the injunction; and (4) the possibility of substantial harm to others if the injunction is issued. *G & V Lounge, Inc., v. Michigan Liquor Control Comm'n,* 23 F.3d 1071, 1076 (6th Cir. 1994). Sixth Circuit precedent makes it clear that these four factors are not absolute prerequisites, but must rather be balanced by the Court. *Performance Unlimited v. Questar Pubs., Inc.,* 52 F.3d 1373, 1381 (6th Cir. 1993) (citing In re DeLorean Motor Co., 755 F.2d 1223, 1229 (6th Cir. 1985)). If a party demonstrates substantial likelihood of success on the merits, the three other factors will favor the party as well. *Planned Parenthood Ass'n v. McWherter,*

716 F. Supp. 1064, 1066 (M.D. Tenn. 1980); *cf. Performance Unlimited*, 52 F.3d at 1385-86 (quoting Merrill Lynch, Pierce, Fenner & Smith, 836 F. Supp. 428, 432 (W.D. Mich. 1993) (citation omitted)). The Court will therefore focus its inquiry upon the first factor, although it will also discuss the others in turn.

A. Likelihood of Success on the Merits

This Court enjoined the original Ordinance on two grounds: 1) the Ordinance failed to sufficiently maintain the status quo pending judicial review; and 2) the Ordinance did not provide for prompt judicial review. (Court's Mem. at 10-15.) Both of the grounds fell under the Court's analysis of the Plaintiffs' likelihood of success on the merits. *Id.*

Although facial challenges to a licensing scheme are disfavored, they are permitted in the First Amendment context when the licensing scheme is challenged as permitting undue delay, "such that 'every application of the statute create[s] an impermissible risk of suppression of ideas,'" as is the case here. *FW/PBS. Inc. v. City of Dallas,* 493 U.S. 215, 223-24 (1990) (quoting City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 798, n. 15 (1984)). Licensing schemes such as the one at issue are subject to prior restraint First Amendment constitutional analysis. While there is a "heavy presumption against [their] constitutionality," *FW/PBS. Inc.. v. City of Dallas,* 493 U.S. 215, 225 (1990) (quoting *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 562 (1975)), such a system will be upheld if it incorporates certain procedural safeguards. *Freedman v. Maryland,* 38 U.S. 51, 58 85 S.Ct. 734 (1965). Specifically, the decision-maker must not be

given unlimited discretion so as to risk suppression of protected speech. *FW/PBS*, 493 U.S. at 225-26. An ordinance which does not restrict the time in which a decision must be made is a form of such unbridled discretion. *East Brooks Books v. City of Memphis,* 48 F.3d 220, 224 (6th Cir. 1995). Accordingly, a statute must impose restraints in advance of a final judicial determination for only a brief period of time, preserve the status quo during that time, and afford expeditious judicial review. *Id.* at 224.

1. Status Quo

Plaintiffs did not respond to Defendant's assertion that the amended Ordinance now provides for preservation of the status quo pending judicial review, (*See* Pls.' Mem.), as Defendant noted during oral argument. Upon review of the record and in light of Plaintiffs' failure to respond to this issue, the Court finds that the amended Ordinance does, in fact, provide for the maintenance of the status quo pending judicial review such that Plaintiffs are no longer likely to succeed on the merits of this particular issue.

2. Prompt Judicial Review

The Defendant argues that the amended Ordinance, together with the amended State statute regarding writs of certiorari, provide for prompt judicial review. The administrative determination will be complete within 47 days and the appeal process following adverse administrative decisions will be complete within 40 days. (Def.'s Mem. at 9.) The 47-day process is mandated by the timetable built into the Ordinance. The amended writ statute answers this Court's concern regarding the issuance of an

opinion within a mandated period of time by requiring that all First Amendment cases be heard and decided within 40 days. (Def.'s Mem. at 7).

Defendant next points out that the 40-day period within which writ decisions regarding the First Amendment must be made is less than the impermissible 5 month delay cited in *East Brooks Books v. City of Memphis,* 48 F.3d 220 (6th Cir. 1995) (rehearing and suggestion for rehearing *en banc* denied May 5, 1995). Furthermore, though the case law does not indicate what specific time period would satisfy the "prompt judicial review" standard, *United States v. Thirty-Seven (37) Photographs,* 402 U.S. 363, 373-74 (1971), determined that 60 days for the completion of judicial proceedings was sufficient to meet the standard. Thus, the period for completion of judicial review under the amended Ordinance sufficiently cures the enjoined Ordinance's flaw in not providing any meaningful period of time within which an opinion must issue, as well as meets the legal standard for "prompt judicial review."

The Defendant further notes that the Court cited approvingly to a case in its Memorandum granting the preliminary injunction in which a 90-day waiting period from the beginning to the end of the judicial proceedings was found reasonable. *Wolff v. City of Monticello,* 803 F. Supp. 1568, 1574 (D. Minn. 1992). The waiting period under the ordinance as amended is only 87 days – 47 for the initial determination and 40 for the judicial review. Finally, in the event that the court fails to rule within 40 days of the filing of the appeal, the license shall issue. Metropolitan Code § 6.54.150(A)(10).

Plaintiffs counter with three arguments. First, Plaintiffs contend that in the Sixth Circuit, "prompt judicial review" requires a prompt judicial *determination*, not merely access to review. (Pls.' Mem. at 3-4 citing *East Brooks Books, supra.*) Second, the Ordinance still does not mandate a time by which a writ petition must be granted or denied. (Pls.' Mem. at 5.) Since courts determine their own dockets and the only remedy for tardiness is popular vote, the Ordinance cannot guarantee that a decision will be handed down by the court hearing the writ petition within a sufficiently "prompt" period of time. *Id.* Plaintiffs also contend that courts will not be bound by the 40-day period in which they are to hand down decisions since a similar statute requiring Judges in non-jury cases to render an opinion within 60 days was held to be directory, not mandatory. (*Id.* at 5-6, citing *Schaeffer v. Richard*, 43 Tenn. App. 205, 306 S.W.2d 340 (1956, *cert. den.* Tenn. Sup. Ct. 1957.) Finally, Plaintiffs argue that the granting of a writ petition is discretionary and provides for an extremely narrow scope of review even when granted. (*Id.* at 6-13.) Common law writs only allow a determination of whether the Board acted illegally, fraudulently, or beyond its jurisdiction. (*Id.* at 8.) Thus, Plaintiffs contend, the intrinsic correctness of the Board's decision can not be reviewed pursuant to a common law writ. (*Id.* at 6.)

The Court notes initially that Plaintiffs are correct in their assertion that the Sixth Circuit requires a prompt judicial determination in order to meet the "prompt judicial review" standard. J. David Guerrera, Note, *Constitutional Law: The Meaning of Prompt Judicial Review Under the Prior Restraint Doctrine After FW/PBS v. City of Dallas,* 62 Brook. L. Rev., 1217, 1241-42. However, the Court disagrees with Plaintiffs that the State writ of

certiorari statute as amended does not mandate a determination within a sufficiently prompt period of time. The statute clearly states that a decision must be handed down within 40 days of the court granting the writ of *certiorari*. Tenn. Code Ann. § 27-9-111. The Defendant has filed an affidavit from the Clerk and Master for the Chancery Courts of Davidson County in which she swears that "[g]enerally, our office processes all petitions for a writ of *certiorari* including presenting the proposed order and petition to a chancellor, docketing the signed order and issuing the writ of *certiorari* within two days of the filing of the petition." (Def.'s Exhibit D to Mot. at 2.) Thus, Plaintiffs' concern that the courts will not promptly determine whether or not to grant the writ petition is unfounded.

Plaintiff's second contention, that the courts will not be bound by the 40-day period, relies on reasoning from *Schaeffer v. Richard, supra*. The *Schaeffer* decision is distinguishable, however, since in that case, the legislature did not declare void decisions that were not rendered within the mandated 60-day period. *Id.* at 212. Thus, in that case there was no recourse if a decision was rendered outside of the "mandated" period. In the instant case, if a decision is not rendered within the 40-day period, then the license shall issue, thus a safeguard is in place against judicial tardiness. The legislature need not declare the tardy decision void, since the license shall issue and remain in effect until and unless the decision finally rendered revokes it. Therefore, this argument by the Plaintiffs also lacks merit.

As for Plaintiffs' contention that the granting of the writ is discretionary and that it is too narrow in scope to provide adequate judicial review, this Court notes that

Plaintiffs admitted during oral argument that Defendant has done all that it can do within its power as Metro to make judicial review of Board determinations prompt. The Court is not convinced by Plaintiffs' argument that the amended statutory language of the State writ statute does not require that all First Amendment cases be heard, thereby causing a fatal flaw in the statute. Plaintiffs themselves argue that without a review under a writ of *certiorari*, applicants will have no basis for review of adverse decisions. The Tennessee Supreme Court has ruled, however, that common law writs should be granted where denial of the writ is "tantamount to the denial to either party of a day in court." *State v. Johnson,* 569 S.W.2d 808, 815 (Tenn. 1978) (Finding exceptions to the general rule that the common law writ does not permit review of the correctness of a judgment.). As for the scope of review, the state courts have determined that a violation of a constitutional standard falls within the definition of "illegal, arbitrary, or fraudulent" actions which are reviewable under common law writs. *Hoover, Inc. v. Metro Bd. of Zoning Appeals,* 924 S.W.2d 900, 905 (Tenn. App. 1996.). Furthermore, "[u]nder the common law writ of certiorari, . . . [w]hether or not there is any material evidence to support the action of the agency is a question of law to be decided by the reviewing court *upon an examination of the evidence introduced before the agency." Watts v. Civil Serv. Bd. for Columbia*, 606 S.W.2d 274, 276-77 (Tenn. 1980) (Emphasis added.) Thus, the Court finds that Plaintiffs are incorrect in asserting that the "intrinsic correctness" of the Board's decisions under the Ordinance cannot be reviewed.

Plaintiffs argued at the hearing that a mistake in documentation for an entertainer as to his or her age, for

example, would not be reviewable under a writ of *certiorari*. The Court submits that such an error is easily remedied by providing the correct documentation to the Board via a corrected or even a completely new application. Furthermore, in the Court's Memorandum granting the preliminary injunction, the Court referenced a proposed rule from Defendants that was more vague than the language ultimately used to amend the Ordinance and stated that the rule was flawed in that it was merely a proposal, but that an enacted version of the rule is "exactly what must be promulgated in order to satisfy the judicial review requirements under the prior restraint doctrine." (Ct.'s Mem. at 15.) Defendant has come back to this Court with an amendment more specific than its proposed rule which mandates that decisions must be rendered by courts within an acceptable, specific period of time. Furthermore, the Ordinance now requires that a license issue if the judicial proceedings take longer than 40 days. This Court noted in its December 8, 1997 Memorandum that such a provision would meet the directives of the First Amendment. (*Id.*)

Based on the above analysis, this Court finds that Plaintiffs can no longer demonstrate a substantial likelihood of success on the merits, as they could when the preliminary injunction was originally issued. Therefore, although analysis of the original Ordinance favored the Plaintiffs with respect to the other three factors since Plaintiffs established a substantial likelihood of success on the merits, that is no longer the case.

B. Irreparable Harm

It is settled that non-obscene nude dancing is constitutionally protected activity within the scope of the First

Amendment. *Barnes v. Glen Theaters. Inc.,* 501 U.S. 560, 565-66 (1991); *G & V Lounge Inc. v. Michigan Liquor Control Comm'n,* 23 F.3d at 1075. However, since prior restraint of the dancing is no longer a substantial threat, the Court finds that irreparable harm will not be caused if the Ordinance as amended goes into effect.

C. Public Interest

Since the statute no longer presents a substantial possibility of infringing upon an individual's constitutional rights, the amelioration of the harmful side effects that sexually oriented businesses may promote is sufficient for this Court to find that this factor favors the Defendant.

D. Possibility of Substantial Harm to Others

This Court has found that an individual's constitutional rights are no longer at substantial risk under the Ordinance; therefore, it follows that there is no risk of substantial harm to others if the injunction is lifted. Indeed, this Court would harm the autonomy of the legislative bodies of the State of Tennessee and the City of Nashville if it continued to enjoin this Ordinance having found that Plaintiffs lack a substantial likelihood of success on the merits. Thus, this factor favors Defendant's position, as well.

III. Conclusion

The Court finds that the Ordinance as amended no longer presents substantial prior restraint problems since it provides for prompt judicial review of adverse decisions and the maintenance of the status quo while adverse

decisions are appealed. Therefore, Plaintiffs can no longer demonstrate a substantial likelihood of success on the merits and the preliminary injunction issued by this Court on December 7, 1997 is no longer justified. Accordingly, Defendant's motion to dissolve that preliminary injunction is GRANTED and the injunction is hereby dissolved.

An Order consistent with this memorandum will be filed contemporaneously.

Entered this the 1st day of December, 1998.

/s/ John T. Nixon
JOHN T. NIXON, SENIOR JUDGE
UNITED STATES DISTRICT COURT

Supreme Court, U.S.
FILED

No. 05-1194 MAR 16 2006

OFFICE OF THE CLERK

In The
Supreme Court of the United States

THE METROPOLITAN GOVERNMENT OF NASHVILLE and DAVIDSON COUNTY, TENNESSEE,

Petitioner,

v.

DEJA VU OF NASHVILLE, INC., a Tennessee corporation; MICHAEL RUCKER, individually; MICHAEL BUTLER, individually; MERONEY ENTERTAINMENT, INC. (d/b/a Ken's Gold Club), a Tennessee corporation; THE PLEASURE PALACE, INC., a Tennessee corporation; DAWN PIERCE, individually; ELIZABETH MARTZ, individually; JERRY C. PENDERGRASS, individually; THE 822 CORPORATION; and 421 CORPORATION,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

APPENDIX to PETITION FOR A WRIT OF CERTIORARI VOLUME II, Pages 180a-368a

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March 16, 2006

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IN THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC. et al.	
v.	No. 3:97-1066
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.,	Chief Judge Nixon

ORDER

(Entered Dec. 8, 1997)

Pending before the Court is the Plaintiffs' Motion for Preliminary Injunction (Doc. No. 2), to which the Defendants have filed a Response (Doc. No. 19). Also pending is the Motion by Jerry C. Pendergrass and others to intervene (Doc. No. 11). The same parties seeking to intervene in this action subsequently initiated their own action, alleging similar harms: Pendergrass v. Metropolitan Government of Nashville and Davidson County, Case No. 3:97-1176. The Plaintiffs in this later action have also filed a Motion for Preliminary Injunction (Doc. No. 3). Because these two cases present similar issues of law and fact, such that consolidation would further judicial economy and impose no prejudice upon the parties, the Court hereby ORDERS that the two actions be consolidated. Accordingly, the motion to intervene is now moot and the Plaintiffs' respective motions for a preliminary injunction will be treated jointly.

After reviewing the record, the Court finds that the Plaintiffs' Motion for a Preliminary Injunction should be

GRANTED. It is ORDERED that the Defendants, Metropolitan Government of Nashville and Davidson County, and Emmett Turner, Chief of Police, are hereby prohibited from enforcing any of the provisions of Chapter 6.54 of the Nashville and Davidson County, Tenn. Code of Laws until otherwise tied by the Court.

It is so ORDERED.

Entered this the 5th day of December, 1997.

/s/ John T. Nixon
JOHN T. NIXON,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

DEJA VU OF NASHVILLE, INC. et al.	
v.	No. 3:97-1066
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY, et al.	Chief Judge Nixon

MEMORANDUM

(Entered Dec. 8, 1997)

Pending before the Court is the Plaintiffs' Motion for Preliminary Injunction (Doc. No. 2), to which the Defendants have filed a Response (Doc. No. 19). Also pending is the Motion by Jerry C. Pendergrass and others to intervene (Doc. No. 11). The same parties seeking to intervene in this action subsequently initiated their own action, alleging similar harms: Pendergrass v. Metropolitan Government of Nashville and Davidson County, Case No. 3:97-1176. The Plaintiffs in this later action have also filed a Motion for Preliminary Injunction (Doc. No. 3). Because these two cases present similar issues of law and fact, such that consolidation would further judicial economy and impose no prejudice upon the parties, the Court hereby orders that the two actions be consolidated. Accordingly, the motion to intervene is now moot and the Plaintiffs' respective motions for a preliminary injunction will be treated jointly. The Court held a hearing on December 1, 1997, during which time the parties had an opportunity to present evidence and argue their positions.

After reviewing the record, the Court finds that the Plaintiffs have satisfied their burden of proving the elements necessary for a preliminary injunction, and orders that the Defendants be hereby enjoined from enforcing any of the provisions of Chapter 6.54 of the Metropolitan Code of Laws.

I. BACKGROUND

The Plaintiffs are a group of establishments and individuals which provide adult public entertainment in the form of live nude and/or semi-nude performance dance entertainment in a club environment, and operate adult theaters and bookstores. They are seeking to enjoin a regulatory scheme enacted by the Council of the Metropolitan Government of Nashville and Davidson County on August 19, 1997, which requires "sexually oriented businesses" to obtain licenses before being permitted to operate, and adult entertainers employed in these establishments to also obtain permits in order to perform. The mayor approved the ordinance on August 25, 1997, and it took effect on November 1, 1997. Existing business have one hundred and twenty days after November 1st to apply for a license, Nashville and Davidson County, Tenn., Code § 6.54.030(F) (Supp. Sept. 1997), and entertainers have forty-five days from that date to apply for a permit, § 6.54.060(B).

The ordinance specifically requires partners in a partnership who participate in the day-to-day running of a sexually oriented business, majority stockholders of such businesses, and any officers or directors of such businesses (collectively "operators"), to obtain licenses to operate issued by a specially established board. § 6.54.010(S). The

term "sexually oriented business" as defined by the ordinance includes bookstores, video stores, theaters, and nightclubs which "regularly present[] material or exhibitions distinguished or characterized by an emphasis on matter depicting . . . 'specified sexual activities' or 'specified anatomical areas.'" § 6.54.010(S)(1)-(4). The application for a license requires the operators to provide such information as addresses, employment history, criminal violations of a sexual nature or involving moral turpitude, fingerprints, citations of zoning code violations, and diagrams of booth, stalls, and cubicles. §§ 6.54.040(A)(5)-(6), 6.54.070(A)(2). Applicants who have been convicted or pleaded nolo contendere to a crime of a sexual nature or involving moral turpitude are prohibited from obtaining licenses for specified periods of time, two years from the date of conviction for a misdemeanor, and five years from the date of conviction for a felony. §§ 6.54.040(C)(2)(a)-(b), 6.54.070(A)(9). Similar requirements apply for entertainers seeking to obtain a permit. Licenses must be renewed on a yearly basis, and can be revoked for a variety of reasons specifically prescribed in the statute, including discovery that an operator employs an entertainer who does not have a permit, or furnishes sexually explicit material to minors. §§ 6.54.100, 6.54.140.

Once the application is received, the board must distribute a copy of the application "promptly" to the police department, the department of codes and administration, the health department, the fire department, and the applicant. § 6.54.040(A)(1). The departments are required to conduct inspections and to provide the reports to the board within thirty days of receipt of the application. § 6.54.040(B)(3). The board is then required to make its determination within twenty days of receiving these

reports. §6.54.040(C)(1). However, if the board needs additional information, or is awaiting out-of-state documentation, it may hold the application for an additional thirty days before issuing its initial decision. § 6.54.040(C)(7).

The ordinance makes provisions for the appeal of unfavorable decisions. In the case of both operators and entertainers, if the license is denied, the applicant has the right to request a hearing within ten days of notification of the decision. §§ 6.54.040(E)(1), 6.54.070(D)(6). Once the request is received, the board is required to schedule a hearing at its next meeting, during which time it hears evidence presented by the applicant and issues its final decision.[1] §§ 6.54.040(E)(1)(b), 6.54.070(D)(6)(b). The denial of a license is required to be mailed within ten days to the applicant's address. §§ 6.54.040(E)(1)(e), 6.54.070(D)(6)(e). An appeal of this decision may made directly to the Chancery Court for the state of Tennessee. §§ 6.54.040(E)(2), 6.54.070(D)(7). The metropolitan government department of law may institute proceedings for a declaratory judgment. *Id.* In addition, the ordinance permits an applicant to appeal by filing a petition for a writ of certiorari, in which case the board must submit all records of the proceedings before it to the court within ten days. *Id.*

II. DISCUSSION

In order to determine the propriety of injunctive relief, the court must look to the following factors: (1) the likelihood of the movant's success on the merits; (2) the irreparable

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[1] The board is required to meet twice per month. § 6.54.020(D)(1). Board Policy No. 10 dictates that the board must meet the second and fourth Tuesdays of every month.

harm that could result if the injunction is not issued; (3) the impact on the public interest of granting or denying the injunction; and (4) the possibility of substantial harm to others if the injunction is issued. *G & V Lounge, Inc. v. Michigan Liquor Control Comm'n,* 23 F.3d 1071, 1076 (6th Cir. 1994). Sixth Circuit precedent makes it clear that these four factors are not absolute prerequisites, but must rather be balanced by the Court. *Performance Unlimited v. Questar Pubs., Inc.,* 52 F.3d 1373, 1381 (6th Cir. 1993) (citing In re DeLorean Motor Co., 755 F.2d 1223, 1229 (6th Cir. 1985)). If a party demonstrates substantial likelihood of success on the merits, the three other factors will favor the party as well. *Planned Parenthood Ass'n v. McWherter,* 716 F. Supp. 1064, 1066 (M.D. Tenn. 1980); *cf. Performance Unlimited,* 52 F.3d at 1385-86 (quoting Merrill Lynch, Pierce, Fenner & Smith, 836 F. Supp. 428, 432 (W.D. Mich. 1993) (citation omitted)). The Court will therefore focus its inquiry upon the first factor, although it will also discuss the others in turn.

A. Likelihood of Success on the Merits

For the purpose of the preliminary injunction, the Plaintiffs have limited their motion to two issues, first, they challenge the ordinance on its face because it fails to provide for prompt judicial review of the board's decision, and second, they challenge the disabling provisions of the ordinance.

Although facial challenges to a licensing scheme are disfavored, they are permitted in the First Amendment context when the licensing scheme is challenged as permitting undue delay, "such that 'every application of the statute create[s] an impermissible risk of suppression of

ideas,'" as is the case here. *FW/PBS, Inc. v. City of Dallas,* 493 U.S. 215, 223-24 (1990) (quoting City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 798, n. 15 (1984)). Licensing schemes such as the one at issue are subject to prior restraint First Amendment constitutional analysis. While there is a "heavy presumption against [their] constitutionality," *FW/PBS. Inc. v. City of Dallas,* 493 U.S. 215, 225 (1990) (quoting Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 562 (1975)), such a system will be upheld if it incorporates certain procedural safeguards. *Freedman v. Maryland,* 38 U.S. 51, 58 85 S.Ct. 734 (1965). Specifically, the decision-maker must not be given unlimited discretion as to risk suppression of protected speech. *FW/PBS*, 493 U.S. at 225-26. An ordinance which does not restrict the time in which a decision must be made is a form of such unbridled discretion. *East Brooks Books v. City of Memphis,* 48 F.3d 220, 224 (6th Cir. 1995). Accordingly, a statute must impose restraints in advance of a final judicial determination for only a brief period time, preserve the status quo during that time, and afford expeditious judicial review. *Id.* at 224.

1. Undue Delay

The Plaintiffs allege that this ordinance fails to meet these promptness requirements for three reasons. First, it allows for a wait of almost one hundred days before an appeals hearing is conducted. This includes a one day wait for the board to distribute the application;[2] thirty days for

[2] Although the statute itself only requires that the board distribute the application promptly, the board has interpreted this to mean that the application should be distributed the same day they are received, or the following business day if received after 4:00 p.m. Board

(Continued on following page)

the departments to conduct their inspections; twenty days for the board to make its determination; in certain circumstances, an additional thirty days for the board to act; one day for the applicant to request an appeals hearing (assuming he or she acts promptly); and fourteen days for the board to meet and hold the hearing. The plaintiffs claim that this delay exceeds the sixty-day delay in *East Brooks Books*, which the Sixth Circuit held was unconstitutional.

The Defendants maintain that the ordinance places brief and specified time periods on the board to act on the application. They calculate the time period in which an initial decision is made differently, without including the time required to hold a hearing on appeal before the board. They point out that the ordinance imposes only an eighty-one-day waiting period before the initial determination by the board, and that this is close to the sixty-day period which was upheld in *DLS, Inc. v. City of Chattanooga,* 894 F. Supp. 1140 (E.D. Tenn. 1995), and *Ellwest Stereo Theater, Inc. v. Broxer*, 718 F. Supp. 1553, 1570 (M.D. Tenn. 1989).

However, neither *East Brooks Books, DLS,* or *Ellwest* are directly on point with respect to this issue. The opinion in *Ellwest* does not even reach the issue of whether the length of time given to a decision-maker to issue a license suppresses free speech. Similarly, the court in *East Brooks Books* did not discuss whether the time given to the decision-makers to issue a license was not constrained and therefore a form of unbridled discretion. Rather, the court focused on whether there was prompt judicial review of

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Policy No. 5. For the purposes of this motion, the Court will accept the board's interpretation.

the licensing decisions. *See East Brooks Books,* 48 F.3d at 224-225. The Supreme Court in *FW/PBS* has made clear however, that these are two separate inquiries. First, the ordinance must place limits on the time during which the decision to issue a license is made, and preserve the status quo during that time, and second, there must also be prompt judicial review of this decision. *FW/PBS,* 493 U.S. at 227. Finally, while the district court in DLS did discuss the issue of whether the licensing ordinance sufficiently limited the time in which the decision-maker must determine whether to issue a license, the Sixth Circuit on appeal did not touch upon the issue. This was because the Sixth Circuit determined that the Plaintiffs did not have standing to challenge the licensing scheme. *See DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 413 (6th Cir. 1997). Thus, since the district court erroneously concluded that the plaintiffs had standing to challenge the licensing scheme, any decision that it made with respect to this issue is dicta.

Accordingly, the most recent and direct authority on this issue is the Supreme Court decision in *FW/PBS*. In that case, Justice O'Connor[3] determined that the licensing scheme at issue in that case should be struck down because it allowed for an "indefinite postponement of the issuance of a license." *FW/PBS*, 493 U.S. at 227. This was

[3] Only two other Justices, Stevens and Kennedy, joined in this part of Justice O'Connor's opinion. However, Justices Brennan, Marshall, and Blackmun in their concurrence agreed with the aspects of Justice O'Connor's opinion that are at issue here. These Justices' only disagreement with O'Connor's opinion was with her determination that the government need not bear the burden of effecting the denial of a license in court, or bear the burden of proof once in court. *See FW/PBS*, 493 U.S. at 439-42.

so because although the ordinance required the chief of police to rule on the issuance of a license within thirty days after the receipt of the application, a license could not be issued without the approval of other departments. *Id.* The ordinance did not limit the time during which these departments were required to make their inspections. *Id.*

The ordinance presently at issue has a sufficiently circumscribed time limit for the issuance of a license or permit. The only indeterminate time allowance in the ordinance is the provision that directs the board to distribute the application, when first received, "promptly" to the various departments that need to conduct inspections. § 6.54.040(A)(1). However, the board has sufficiently cured this by adopting a policy which requires them to distribute the application at the latest by the next business day. Board Rule 5. The Plaintiffs nevertheless maintain that the waiting period, even if sufficiently specified, is too long to constitute a "reasonable time period." *See East Brooks Books*, 48 F.3d at 224. "The reasonableness of the time period during which a restraint on speech may operate prior to judicial review "may vary in different contexts." *11126 Baltimore v. Prince George's County, MD,* 58 F.3d 988, 997 (4th Cir. 1995) (quoting United States v. Thirty-Seven Photographs, 402 U.S. 363, 374 (1971)). The court should take into account "the type of judgments to be made by the government officials and the hardship placed on the class of applicants by the restraint." *Id.* (citation omitted).

As an initial matter, it should be noted that the time period in which an initial decision must be made does not include the time it takes to appeal or obtain a hearing at the administrative level. The Sixth Circuit made this clear in *East Brooks Books,* when it included the time required